SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 56

THE UNITED STATES OF AMERICA, PETITIONER

vs.

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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1 In United States District Court, Eastern District of Virginia

Civil Action No. 321

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY, PETITIONERS

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

Petition

Filed March 17th, 1944

To the Honorable the Judge of the District Court of the United States for the Eastern District of Virginia:

Your petitioners, Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of the properties of Seaboard Air Line Railway Company, with its principal office in the City of Norfolk, in the Eastern District of Virginia, respectfully show to the Court the following case, to wit:

2 1. Petitioners are citizens and residents of the Eastern District of Virginia and are duly qualified Receivers of the properties of Seaboard Air Line Railway Company, a common carrier by railroad, engaged in the carriage of freight and passengers in interstate and intrastate commerce, appointed by orders of the District Court of the United States for the Eastern District of Virginia and by orders of the District Court of the United States for the Southern District of Florida, in ancillary receivership proceedings instituted and still pending in said Court.

2. This action is brought under paragraph 20 of Section 24 of the Judicial Code of March 3, 1911, 36 Stat. 1093, as amended, 28 U. S. Code Section 41 (20). The petitioners' claim does not exceed $10,000.00 and is founded upon a contract with the Government of the United States, defendant herein, as hereinafter more fully appears.

3. Defendant is indebted to petitioners in the sum of Six Hundred and Thirty-seven Dollars and Fifty-four Cents ($637.54), being the unpaid balance of the sum of Seven Hundred and Thirty-three Dollars and Seventy-nine Cents ($733.79) rightfully due in full from defendant to petitioners for services in carriage by petitioners on their line of railroad in the year 1942 of various carload shipments of woodpulp transported for and on behalf of defendant from Savannah, Georgia, to Norfolk, Virginia, con-

shipments to British Ministry of War Transport, the said shipments having been moved upon Government bills of lading duly authorized and issued.

Defendant has never questioned correctness of the charge in the said amount of $733.79 for the services in respect of which the same was made, and on the 14th day of September, 1942, defendant paid petitioners $96.25, leaving still owing and unpaid the said balance of $637.54.

Annexed to this petition and made a part hereof is a statement of compilation marked "Exhibit to Petition" showing
3 the details of the transportation services performed as aforesaid, including references to General Accounting Office settlements or Government check numbers, date of receipt of Government check (in payment on account as aforesaid) and references to the lawfully published and effective tariffs showing the freight rate applicable to the transportation of the shipments involved.

4. Said sum of $96.25 was accepted by petitioners under protest and as part payment only. Petitioners subsequently rendered their bill to defendant for the unpaid balance of said transportation charges which defendant has withheld and still fails and refuses to pay in whole or in part.

Wherefore, petitioners pray for a judgment or decree against the United States upon the facts and law for said Six Hundred and Thirty-seven Dollars and Fifty-four Cents ($637.54).

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY,

Petitioners,

By (Sgd.) W. R. C. Cocke,
W. R. C. COCKE,

(Sgd.) Thomas L. Preston,
THOMAS L. PRESTON,

(Sgd.) F. S. SARGEANT,
Counsel for Petitioners,
550 S. A. L. Railway Building, Norfolk, Virginia.

[*Duly sworn to by Legh R. Powell; jurat omitted in printing.*]

Exhibit to petition

From—Savannah, Ga.
Shipper—Union Bag and Paper Co.
Consignee—British Ministry of War Transport, c/o Furness Withy & Co., Norfolk, Va.
Route—S. A. L. Ry. Direct.
Articles—Rolls Wood Pulp, N. O. I. B. N.

S. A. L. Ry. bill July 1942 number	Bill of Lading		Car		Delivered on or about	Weight (in pounds)	Applicable tariff rate	Amount claimed	Amount paid	Balance claimed	Reference to general accounting office settlement and Government check number
	Number	Date	Initials	Number							
PD-7-23	204560	6-14-42	Erie	81714	6-17-42	52343	#23 (¢ per cwt.)	$120.60			General Accounting Office Notices of Exception August 5, 1942, to DO-Vouchers 574384 $472.81 and 760926 $164.73, S. A. L. Ry. Bills TD-130-140 and TD-130-199 respectively.
			SAL	11832	6-17-42	51499	23 (¢ per cwt.)	118.45			
			ACL	51928	6-17-42	52689	23 (¢ per cwt.)	121.18			
			NYC	153984	6-17-42	56681	23 (¢ per cwt.)	130.37			
			ACL	13212	6-17-42	53196	23 (¢ per cwt.)	122.35			
			B&LE	90265	6-17-42	52539	23 (¢ per cwt.)	120.84			
						319038		733.79	$96.25	$637.54	Amount $96.25 paid by U. S. Treasury Warrant No. 52595, Certificate No. 415195.

Tariff Authorities:
Agent C. A. Spaninger's Southern Export Tariff. 705-E, I. C. C. 729 and
Agent C. A. Spaninger's Tariff of Increased Rates & Charges x 148, I. C. C. 229.

5 In United States District Court

Answer and counterclaim

Filed June 27th, 1944

Answer

The defendant, the United States of America, appearing by Harry H. Holt, United States Attorney for the Eastern District of Virginia, for answer to the petition says:

1. Admits the allegations in Paragraphs 1, 2 and 4 and the second and third sentences in paragraph 3.

2. Denies that it is indebted to petitioners in the sum of $637.54 or any part thereof.

Counterclaim

For its counterclaim defendant alleges:

3. In or about August 1941, petitioners carried on Government bills of lading and billed defendant in the amount of $2,608.70 for phosphate rock and $546.17 for superphosphate consigned to the British Ministry of War Transport. The petitioners' freight charges were computed at the commercial rate without benefit of land-grant deductions.

4. Defendant paid the bills in the full amounts claimed, notwithstanding that the said phosphate rock and superphosphate were intended for export, to promote the defense of the United States, under the land-lease program, Act of March 11, 1941, Public No. 11 (55 Stat. 31) and Act of March 27, 1941, Public No. 23 (55 Stat. 53).

The phosphate rock and superphosphate were military or naval property of the United States moving for military or naval and not for civil use, and entitled to land-grant deductions (Section 321 (a) of the Transportation Act of 1940, approved September 18, 1940, 54 Stat. 898, 954, Title 49 U. S. C., Section
6 65 (a)).

5. By means of charges at the commercial rate the defendant overpaid petitioners $472.81 on the shipments of phosphate rock and $164.73 on the shipments of superphosphate. Petitioners have never repaid any part of such overcharges.

6. The defendant deducted the sum of the said overpayments from the $733.79 due on petitioners' bill No. PD-7-23 and Government Bill of Lading No. D. A. TPS-204560, as thereunto specifically authorized by section 322 of the Act of September 18,

1940, 54 Stat. 898, 955, Title 49, U. S. C., Section 66, and paid petitioners the balance of $96.25.

Wherefore, defendant prays for judgment on its counterclaim in the amount of $637.54, and that said amount be set off against petitioners' claim herein, and that petitioners' complaint be dismissed at their cost.

(Sgd.) Francis M. Shea,
FRANCIS M. SHEA,
Assistant Attorney General,
(Sgd.) Harry H. Holt, Jr.,
HARRY H. HOLT,
United States Attorney,
Attorneys for Defendant.

7 In United States District Court

Reply to counterclaim

Filed June 30th, 1944

Petitioners, Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of the properties and assets of Seaboard Air Line Railway Company, for reply to the counterclaim of the defendant set forth in paragraphs 3 to 6 inclusive, of the Answer filed herein, say:

1. Replying to paragraph 3 of said Answer, petitioners admit the averments thereof.

2. Replying to paragraph 4 of said Answer, petitioners admit that defendant paid in full the bills referred to in said paragraph, and that the phosphate rock and superphosphate mentioned in said paragraph were intended for export under the lend-lease program. Except as herein expressly admitted, the allegations of said paragraphs are denied. Specifically, petitioners deny that said phosphate rock and superphosphate were military or naval property of the United States moving for military or naval and not for civil use, and entitled to land-grant deductions, as in said paragraph 4 alleged.

3. Replying to paragraph 5 of said Answer, petitioners deny that defendant overpaid petitioners on the shipments of phosphate rock and superphosphate in the amounts alleged in said paragraph, or any other amounts whatsoever.

4. Replying to paragraph 6, of said Answer, petitioners admit that defendant deducted the sum of the alleged overpayments from the $733.79 due on petitioners' bill No. P. D. 7-23 and Govern-

ment Bill of Lading No. D. A. TPS–204560, and paid petitioners the balance of $94.25, as alleged in said paragraph, but deny that said deductions were authorized by law.

8 Wherefore, petitioners pray that defendant's counterclaim be dismissed and further pray for judgment on their Petition in the amount of $637.54.

(Sgd.) W. R. C. Cocke,
W. R. C. Cocke,
(Sgd.) Thomas L. Preston,
Thomas L. Preston,
(Sgd.) F. S. Sargeant,
F. S. Sargeant,
Attorneys for Petitioners,
Seaboard Air Line Rwy. Bldg., Norfolk, Virginia.

9 In United States District Court

Stipulation of facts

Filed October 27, 1944

It is stipulated and agreed by and between petitioners, Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of the properties and assets of Seaboard Air Line Railway Company, hereinafter called "Seaboard", and defendant, The United States of America, hereinafter called "United States", that:

1. During July, 1942, the Seaboard rendered its bill (PD–7–23) against the United States in the sum of $733.79 for freight charges on six carloads of wood pulp which had been transported by the Seaboard from Savannah, Georgia, to Norfolk, Virginia. The United States did not question the correctness of said charges, but deducted from the amount due the sum of $637.54, and on September 14, 1942, paid to the Seaboard the balance of $96.25. The sum of $96.25 was accepted by the Seaboard, but under protest and as part payment only. The Seaboard instituted this action to recover the balance due on said bill, to wit, the sum of $637.54, and the United States has filed herein its counterclaim for the deduction made from said bill.

2. The facts in connection with the said counterclaim are:

On or about August 5, 1941, fifty-six (56) cars of phosphate rock moved on Government bill of lading DA–TPS–190186 as one shipment from Brewster, Florida, to Tampa, Florida, over the Seaboard, consigned to the British Ministry of War Transport. A copy of the bill of lading covering this shipment is attached hereto as a part hereof, marked "Exhibit 1."

On September 5, 1941, the Seaboard submitted to the Treasury Department of the United States, Procurement Division, its bill (TD–130–140) for $2,608.70, covering the transportation charges on this shipment, based on the commercial rate.

A copy of this bill is attached as a part hereof, marked "Exhibit 2." It is agreed that the charges set out in this bill are at the commercial rate. On or about September 30, 1941, the United States paid this bill as rendered.

On August 5, 1942, the General Accounting Office of the United States took exception to this payment by notice directed to the Seaboard. This notice of exception, so far as material, reads:

"Bill No. TD–130–140.

"B/L DA–TPS–190186. August 5, 1941. Phosphate rock. Brewster, Florida, to Tampa, Florida (For export). Paid $2,608.70. Should be $2,135.89. Difference $472.81.

"Thru rate 75¢ Gross Ton as per SFA Tariff 705–D. Rate applies via SAL and is subject to 24.891% L. G. Making net rate of 56.332¢ per Gross Ton. To this rate is added 25¢ per Gross Ton for wharfage at Tampa.

"Shipments are military or naval property and subject to land grant deductions."

During August 1941, twenty-two (22) cars of superphosphate moved on Government Bills of Lading Nos. DA–TPS–190194, 190196, 190197, 190195 and 190223, from Nichols, Florida, to Tampa, Florida, over the Seaboard consigned to the British Ministry of War Transport. Copies of these bills of lading are attached hereto as a part hereof, marked, respectively, "Exhibits 3 (a) to 3 (e)," inclusive.

On September 17, 1941, the Seaboard submitted to the Treasury Department of the United States, Procurement Division, its bill (TD–130–199) for $546.17, covering the transportation charges on these shipments computed on the commercial rate. A copy of this bill is attached hereto as a part hereof, marked "Exhibit 4." It is agreed that the charges set out in this bill are at the commercial rate. On or about October 28, 1941, the United States paid this bill as rendered.

On August 5, 1942, the General Accounting Office of the United States took exception to this payment by notice directed to the Seaboard. This notice of exception, so far as material, reads:

"Bill No. TD–130–199.

"B/L See Below. August 1941. Superphosphate. Nichols, Florida, to Tampa, Florida. Paid $546.17. Should be $381.44. Difference $164.73.

"Rate 75¢ NT SFA 392–C. Subject to 30.159% L. G. via SAL. Net rate 52.381¢ NT

B/L DA-TPS	Paid	Should be	Overpaid
190194	573.66	343.98	229.68
190195	133.16	97.41	37.75
190197	102.41	71.59	30.82
190196	102.41	71.82	30.59
190257	146.33	98.01	43.32
	846.17	381.44	164.73

Shipments are military property for military use."

In accordance with the aforesaid notices of exception the United States deducted from the bill herein sued upon the sum of $637.54, that being the aggregate amount of the overpayments claimed in said notices of exception, and by its answer herein the United States sets up its counterclaim in the amount of such deduction.

On October 12, 1943, the Comptroller General of the United States made a ruling B–29861 concerning sundry deductions from Seaboard charges account land-grant rates as applied to shipments of phosphate rock and superphosphate, including the deduction upon which the counterclaim herein is based. A copy of this ruling is attached hereto as a part hereof, marked Exhibit 5.

3 (a) The phosphate rock and superphosphate shipments in respect of which the deduction aforesaid was made moved to Tampa, Florida, consigned to the British Ministry of War Transport, an agency which is a duly authorized representative in the United States of His Majesty's Government in the United Kingdom. This phosphate rock and superphosphate was exported to England under the Lend Lease Program, Act of March 11, 1941, Public No. 11 (55 Stat. 31) and Act of March 27, 1941, Public No. 23 (55 Stat. 53). Copies of the contract covering the purchase of this material are attached hereto as a part hereof respectively marked Exhibit 6 and 7.

3 (b) The Seaboard, within the period provided there-
12 for by Section 321 (b) of the Transportation Act of 1940 (54 Stat. 898, 954), duly filed with the Secretary of the Interior the release provided for in said Section.

3 (c) The shipments of phosphate rock and superphosphate in question were at the time of their transportation the property of the United States. If they were at the time of their transportation by the Seaboard 'military or naval property of the United States moving for military or naval and not for civil use' within the meaning of Section 321 (a) of the Transportation Act of 1940, 54 Stat. 898, 954, the counterclaim asserted by the United States is valid and should be allowed in the amount stated. Otherwise judgment should be rendered in accordance with the prayer of the petition herein.

4. The parties reserve the right to present evidence as to the nature and intended use of the shipments of phosphate rock and

superphosphate in question, and of such further facts as may be relevant, not inconsistent with this stipulation.

LEGH R. POWELL, JR., and HENRY W. ANDERSON, as Receivers of the properties and assets of Seaboard Air Line Railway Company,
Petitioners,

By (Sgd.) W. R. C. COCKE,
(Sgd.) THOMAS L. PRESTON,
(Sgd.) F. S. SARGEANT,
Counsel.

THE UNITED STATES OF AMERICA,
Defendant.

By (Sgd.) HARRY H. HOLT, JR.,
Counsel.

13 *Exhibit 1 to stipulation of facts*

18 List No. 1

SEABOARD AIR LINE RAILWAY

L. R. POWELL, JR., & HENRY W. ANDERSON, RECEIVERS

TAMPA, FLA., *Aug. 5th, 1941.*

WEIGHT STATEMENT

Steamer—"Prince de Liege."
Account—American Cyanamid Co.
Commodity—Phosphate Rock.

Number and initial	Gross	Tare	Net	Freight	
87430 SAL	140,000	42,200	97,800	32.64	
87526	130,200	42,700	87,600	30.33	
87529	136,300	42,000	94,300	31.64	
55366	151,200	44,400	106,800	35.78	
50601	136,000	42,000	94,000	31.47	
87498	130,200	42,300	88,900	29.11	
58174	179,900	50,600	129,300	43.29	
58045	179,100	50,700	128,400	42.99	
58127	181,100	50,800	130,300	43.63	
87587	148,400	41,900	106,500	35.69	
88874	125,000	43,800	81,200	27.19	
87413	139,100	42,900	96,200	31.98	
87494	137,100	43,000	94,100	31.51	
58131	172,000	49,400	122,600	41.05	
58053	165,500	50,700	114,800	38.44	
55529	124,700	44,100	80,600	26.99	
50754	126,800	41,900	84,900	28.43	
87448	127,400	41,900	85,500	28.63	
56709	125,100	42,000	83,100	27.83	
58019	163,400	50,500	112,900	37.80	
87455	127,500	42,500	85,000	28.46	
88532	110,600	43,800	72,800	24.38	
58092	164,700	50,600	114,100	38.20	
50665	132,400	42,000	90,400	26.27	
55515	117,700	43,900	73,800	24.71	
87517	134,100	43,000	91,100	30.50	
58100	116,900	40,500	76,400	25.58	
88004	116,700	41,900	75,700	25.35	
88008	115,400	43,600	71,800	24.04	
	4,087,800	1,389,900	2,798,900	936.44	1235.2282 tons

19 List No. 2

SEABOARD AIR LINE RAILWAY

L. R. POWELL, JR., & HENRY W. ANDERSON, RECEIVERS

TAMPA, FLA., *August 5th, 1941.*

WEIGHT STATEMENT

Steamer—"Prince de Liege,"
Account—American Cyanamid Co.
Commodity—Phosphate Rock.

Number and Initial	Gross	Tare	Net	Freight	
57321 SAL	142, 600	42, 000	100, 600	33. 68	
58073	126, 000	41, 300	84, 700	28. 36	
58087	197, 100	50, 700	146, 400	49. 02	
58024	195, 500	53, 900	142, 600	47. 75	
58149	170, 000	50, 800	119, 200	39. 91	
58036	185, 300	49, 600	135, 700	45. 44	
57328	149, 200	42, 200	107, 000	35. 83	
58539	128, 300	43, 800	84, 500	28. 29	
57524	148, 000	42, 400	105, 600	35. 36	
58661	133, 000	42, 100	90, 900	30. 44	
58534	119, 100	43, 800	75, 300	25. 21	
58648	140, 700	41, 900	98, 800	33. 08	
57469	125, 700	42, 700	83, 000	27. 79	
58199	163, 200	50, 700	112, 500	37. 67	
58063	173, 300	50, 700	122, 600	41. 02	
58593	133, 600	44, 200	89, 400	29. 93	
58122	180, 300	49, 500	130, 800	43. 79	
58788	131, 100	41, 800	89, 300	29. 90	
58602	135, 300	41, 600	93, 700	32. 38	
57445	146, 400	42, 200	107, 200	35. 89	
58789	134, 000	41, 900	92, 100	30. 84	
57430	153, 400	43, 300	110, 100	36. 86	
57562	142, 700	42, 100	100, 600	33. 68	
58157	201, 700	50, 700	151, 000	50. 56	
58031	178, 800	50, 700	128, 100	42. 88	
57452	154, 100	42, 900	111, 300	37. 22	
58786	132, 300	41, 700	90, 600	30. 32	
Sheet #1	4, 124, 700	1, 218, 300	2, 906, 400	972. 10	1, 297. 5000 Tons
	4, 057, 800	1, 290, 900	2, 766, 900	926. 44	1, 235. 2232 Tons
	8, 182, 500	2, 509, 200	5, 673, 300	1, 899. 54	2, 532. 7232 Tons

I hereby certify that I have delivered to the SS PRINCE DE LIEGE 2532.7232 gross tons Florida Land Pebble Phosphate Rock in bulk.

_____, _____,
Agent.

_____, _____,
Notary Public.

Notary Public, State of Florida at large. My commission expires July 24, 1944.

20 GENERAL ACCOUNTING OFFICE

NOTICE OF EXCEPTION

August 5, 1942

To: G. F. Allen, Disbursing Freight Officer.
Cert. Officer, P. J. Carey.
Dept. or Bureau, Treasury, Procurement Division.
Appropriation, Defense Aid, Agricultural, Industrial and Other Commodities (Allotment to Treasury) 1941–1943.
D. O. Vou. No. 574384.
Bu. Vou. No.
Period September 1941.
Activity, Transportation.

Credit for $472.81 paid to Seaboard Air Line Railway will be withheld or a charge will be raised in your next statement of settlement for the reason stated below unless a satisfactory explanation is promptly made or the amount deposited:

Bill No. TD–130–140.

B/L DA–TPS–190186. August 5, 1941. Phosphate Rock. Brewster, Florida to Tampa, Florida (For Export). Paid $2,608.70. Should be $2,135.89. Difference $472.81.

Thru rate 75¢ Gross Ton as per SFA Tariff 705–D. Rate applies via SAL and is subject to 24.891% L. G. Making net rate of 56.332¢ per Gross Ton. To this rate is added 28¢ per Gross Ton for wharfage at Tampa.

Shipments are military or naval property and subject to land grant deductions.

abb. Wk. No. 56253.

LINDSAY C. WARREN,
Comptroller General of the United States.

REPLY TO EXCEPTION

Deduction made on bill #PD–7–23, Bur. Vou. #12482 D O #415195. Paid in the August 1942 Accounts of *G. F. Allen*, Symbol #223750, 20–111/30026.

I certify the foregoing explanation to be true and correct to the best of my knowledge and belief.

G. F. ALLEN, *Chief Disbursing Officer.*

Date Oct. 5, 1942.

39 *Exhibit 5 to Stipulation of Facts*

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON 25

B-29861.

OCTOBER 12, 1943.

Mr. W. D. STEELE, *Auditor of Revenues,*
Seaboard Air Line Railway, Portsmouth, Va.

DEAR MR. STEELE: Reference is made to your letter of July 2, 1943, file 459-A, and prior letter, therein mentioned, concerning claims for additional allowances aggregating $23,423.12, alleged to represent land-grant deductions from commercial transportation charges otherwise payable for transporting certain shipments of phosphate rock from several mines in Florida to Tampa, Florida, in 1941. Your contention, as stated in your letter of October 20, 1942, is that such land-grant deductions are not in order for the principal reason that the use of the property shipped was "for fertilizer for raising the crops of the British people" and that, therefore, the several shipments here involved cannot be viewed as having consisted of "Military or Naval property" moving for "military" use within the meaning of section 321 of the Transportation Act of 1940.

As illustrative of the shipments here involved there has been selected bill No. TD-130-134, which was presented originally for $5,150.45 determined in pertinent part on the basis of a rate of $0.75 per long ton for the transportation of 98 cars of phosphate rock, aggregating 5000.4464 long tons, shipped by the Coronet Phosphate Company from Coronet, Florida, consigned to the British Ministry of War Transport, care of E. H. Buck, Wallace S. Building, Tampa, Florida, under bill of lading DA-TPS-190175, August 1, 1941. The amount so claimed was paid by G. F. Allen, chief disbursing officer, Treasury Department, on voucher No. 574386 of his September, 1941, account, from appropriation "20-111/30026 Defense Aid, Agricultural, Industrial and Other Commodities (Allotment to Treasury) 1941-1943." However, the record indicates that thereafter the disbursing officer, pursuant to a notice of suspension of credit in the amount $1,657.09 made in the audit of said voucher because of the failure to make deduction for land grant from said charges, deducted the amount of $1,657.09 in making payment on voucher No. 502331 of his September, 1942, account from amounts otherwise due the carrier on its bill No. Pd-7-94. The amount so deducted is a part of the sum of $14,225.03 claimed in your letter of October 20, 1942.

Section 321 of the Transportation Act of 1940, 54 Stat. 898, 954, provides, in pertinent part, that—

"Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use * * *."

It is indicated on the bill of lading covering this shipment that the phosphate rock there described was purchased under contract "DATPS–454." The statement and certificate of award relating to said contract states that the purchase of the material was made "pursuant to the provisions of the Act of March 11, 1941, Public, No. 11, and the Act of March 27, 1941, Public, No. 23, to promote the defense of the United States and for other purposes." The contract specifies that the material was purchased for delivery by the contractor f. o. b. Coronet, Florida.

The last mentioned act, being "An Act to Promote the Defense of the United States," approved March 11, 1941, 55 Stat. 31, defines the term "defense article," as used therein, as including "Any agricultural, industrial or other commodity or article for defense," and provides that the President "when he deems it in the interest of national defense" may authorize the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government "To sell, transfer title to, exchange, lease, lend, or otherwise dispose of, to any such government [i. e. the government of any country whose defense the President deems vital to the defense of the United States] any defense article * * *."

With reference to the shipment here concerned the Treasury Department—the procuring agency in this instance—has invited attention to a transfer authorization contained in a transfer directive of the President to the Secretary of the Treasury, dated October 1, 1941, which related to the transfer to the "appropriate officer or representative of His Majesty's Government in the United Kingdom" of "the defense articles covered by the requisitions enumerated on the attached table." Among the requisitions so listed was requisition No. 1133 for 435,000 short tons of phosphate rock. The Treasury Department in further reporting to this office in connection with this shipment, after inviting at-

tention to the above-quoted provisions of the act of March 11, 1941, supra, states:

"* * * Furthermore, this Department has consistently regarded the transportation of defense articles purchased under the Lend-Lease Act as transportation of military property. Since such transportation in which the carrier is involved represents transportation in the defense of the United States, there does not appear to be any inconsistency in regarding such transportation as transportation for military use as distinguished from a civilian use. * * *"

And adds:

"Without conceding that such fact has any bearing on the question, you are advised that, because of the large phosphorous content in the phosphate rock of the type under consideration, such material is generally used as fertilizer and the requisition. (BSC 1133) pursuant to which the foregoing contract was negotiated states that the material is to be used for agricultural purposes. However, such material, if the need therefor arises, has a number of other uses in articles not connected with agriculture, such as the manufacture of tracer bullets, flares, etc."

Likewise a communication since received from the Lend-Lease Administration, relative to the general question of the right of the United States to deduction for land grant from charges for the transportation of "defense articles" under the lend-lease program, shows that substantially the same position has been taken by the Lend-Lease Administration. The administrative views so indicated are for consideration in the light of the rule that where a statute is indefinite or ambiguous the construction given it by the executive department or agency to which is intrusted the execution of the statute is entitled to much weight. Hall-Scott Motor Car Co. v. United States, 77 C. Cls. 674; Beirnie S. Bullard, Admx. v. United States, 66 C. Cls. 264.

Accordingly, I have reached the conclusion that, in the absence of a judicial determination of the matter, this office would not be justified in modifying the settlements here in question so as to certify any additional allowance on the basis that the shipments involved do not constitute military property moving for military use. In this connection it may be added, as a matter of information, that there has come to attention the fact that two suits involving the question of the right of the United States to deduction for land grant from charges for the transportation of articles shipped pursuant to the lend-lease program have been filed against the United States recently by the Southern Pacific Company—one in the Court of Claims of the United States and one in the

United States District Court for the Eastern District of Kentucky.

Respectfully,

(S) LINDSAY C. WARREN,
Comptroller General of the United States.

70 In United States District Court

Supplemental stipulation of facts

Filed November 20th, 1944

It is stipulated and agreed between the plaintiffs and defendant herein, subject to objection as to the relevancy or competency of the evidence, as follows:

The shipments involved in the counterclaim were "defense articles" as defined in the Act of March 11, 1941, Public No. 11 (55 Stat. 31).

When requisition is made by any country the defense of which the President deems vital to the defense of the United States, such requisition is carefully considered and scrutinized. It is then accepted, modified or rejected in accordance with the determination by the President or his duly authorized representative, such as the Lend-Lease Administrator or the Foreign Economic Administration, as to whether or not shipment of the materials requisitioned will promote the defense of the United States in accordance with the provisions of the Lend-Lease Act.

In 1941, at the times the requisitions for the materials involved in the counterclaim were made, approved and authorized, and the shipments moved, there was a serious food situation in Great Britain, by virtue of the fact that Great Britain, normally a heavy food importing nation, was cut off from many sources of supply. Imports were further restricted by shortage of shipping. Great Britain therefore found it necessary to revise her agricultural practices in order to intensify production of food for direct human consumption. It was necessary to put into production a large acreage of land not normally used for the production of food for direct human consumption, and phosphate fertilizers had
71 to be imported and distributed to effectuate this revised agricultural program. The shipments of phosphate rock and superphosphate comprised a part of that program. Great Britain instituted controls which resulted in the proper use and distribution of said materials to accomplish this purpose, for which they were requisitioned and authorized under the Lend-Lease Act. In 1941, the United States was the only practical source from which Great Britain could acquire such materials.

It is further stipulated and agreed that either party may refer to the official published reports made to Congress by or on behalf of the President pursuant to the terms of the Lend-Lease Act, and to rulings of the Comptroller General, without objection, and without their formal introduction in evidence.

It is further stipulated and agreed that the attachment hereto marked "Exhibit A" is a true copy of a letter dated September 21, 1943, from E. R. Stettinius, Jr., Lend-Lease Administrator, to Roy F. Hendrickson, Deputy Food Administrator, War Food Administration, and that such letter is the communication from the Lend-Lease Administrator referred to in the Comptroller General's Ruling No. B-29861, a copy of which ruling constitutes Exhibit No. 5 to the Stipulation of Facts first filed herein.

LEGH R. POWELL, JR., AND
HENRY W. ANDERSON,
as Receivers of the Properties and Assets of Seaboard Air Line Railway Company,
Petitioners.

By (Sgd.) W. R. C. Cocke,
W. R. C. COCKE,
(Sgd.) Thomas L. Preston,
THOMAS L. PRESTON,
(Sgd.) F. S. Sargeant,
F. S. SARGEANT,
Counsel.

THE UNITED STATES OF AMERICA,
Defendant.

By (Sgd.) HARRY H. HOLT, JR.,
Counsel.

72 *Exhibit "A" to supplemental stipulation of facts*

OFFICE OF LEND-LEASE ADMINISTRATION
Five-Fifteen 22nd Street NW.
WASHINGTON, D. C.

SEPTEMBER 21, 1943.

Re: Applicability of Land-Grant Deductions to Lend-Lease Shipments

DEAR ROY:

The question has been raised as to whether, and the extent to which, land-grant deductions are available from charges imposed by certain common carriers for transporting property procured

and shipped pursuant to the Lend-Lease Act ("An Act to promote the defense of the United States", approved March 11, 1941, as amended).

The question is one with which the various agencies procuring and shipping lend-lease commodities and materials have had to deal. I am informed that there has been a difference of opinion in some cases among representatives of such agencies.

Whether or not lend-lease shipments are entitled to land-grant deductions depends upon the interpretation of Section 321, Part 2, Title 3, of the Transportation Act of 1940 (49 U. S. Code, Section 65). This section provides that the full applicable commercial rates shall be paid for the transportation of any persons or property of the United States, "except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use." Our General Counsel has advised me that in his opinion, all shipments of lend-lease materials and commodities intended for transfer to a foreign government constitute military or naval property of the United States intended for military or naval use and not for civil use within the statute in question, for reasons which may be briefly summarized as follows:

The declared purpose of the Lend-Lease Act is "further to promote the defense of the United States". It empowers the President when he deems it to be in the interest of our national defense to authorize the head of any department or agency of the government to procure any defense article "for the government of any country whose defense the President deems vital to the defense of the United States" and to dispose of such defense articles to any such government.

The term "defense article" as used in the Lend-Lease Act is defined in such manner as to include not only articles "any agricultural, industrial, or other commodity or article for defense." Correspondingly, the various acts appropriating funds to carry out the provisions of the Lend-Lease Act include, among others, funds for the purchase of such "agricultural, industrial, and other commodities and articles."

The use made by the United States of all lend-lease materials is to promote the defense of the United States, which is clearly a military and not a civil use. It is this use which is determinative and controlling, rather than the use to which the goods may
73 ultimately be put by the government to which they are transferred. There is therefore no need to inquire into such ultimate use. It is sufficient that the property is being shipped by the United States Government in the interests of its national defense and its military policy.

Similar letters are being submitted to the other government departments and agencies which procure and ship lend-lease materials and commodities, and a copy is being sent to the Comptroller General. I think that all agencies procuring lend-lease materials and commodities should uniformly take the position that shipments of lend-lease materials and commodities intended for transfer to a foreign government comprise military or naval property of the United States moving for a military or naval and not for a civil use within the contemplation of Section 321 of the Transportation Act of 1940, and are, therefore, entitled to the land-grant deductions applicable to such property.

Will you please advise me if the foregoing meets with your approval?

Sincerely yours,

(S) E. R. STETINIUS, Jr.,
Lend-Lease Administrator.

Mr. ROY F. HENDRICKSON,
Deputy Food Administrator, War Food Administration,
319 W. Administration Bldg.,
Department of Agriculture, Washington, D. C.

74 In United States District Court

Civil Action No. 321

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY, PETITIONERS

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

Opinion of the court

Filed March 24th, 1945

This is a suit brought under Paragraph 20 of Section 24 of the Judicial Code of March 3, 1911, 36 Stat. 1093, as amended, 28 U. S. C. A., Section 41 (20), known as the Tucker Act.

The parties have entered into statements of agreed facts, respectively denominated "Stipulation of Facts" and "Supplemental Stipulation of Facts", with certain exhibits attached thereto.

The claim sued upon is for unpaid transportation charges in the amount of $637.54, in respect of which the stipulation of facts reads as follows:

"During July, 1942, the Seaboard rendered its bill (PD-7-23) against the United States in the sum of $733.79 for freight charges on six carloads of wood pulp which had been trans-
75 ported by the Seaboard from Savannah, Georgia, to Norfolk, Virginia. The United States did not question the correctness of said charges, but deducted from the amount due the sum of $637.54, and on September 14, 1942, paid to the Seaboard the balance of $96.25. The sum of $96.25 was accepted by the Seaboard, but under protest and as part payment only. The Seaboard instituted this action to recover the balance due on said bill, to-wit, the sum of $637.54, and the United States has filed herein its counterclaim for the deduction made from said bill."

The pertinent facts as to the counterclaim asserted by the United States, as shown by the stipulation of facts, are as follows:

During August, 1941, fifty-six (56) carloads of phosphate rock, property of the United States, were transported over the Seaboard from Brewster, Florida, to Tampa, Florida, consigned to the British Ministry of War Transport, an agency representative in the United States of His Majesty's Government in the United Kingdom. The shipment moved for export, and was exported, to England under the Lend Lease Program, Act of March 11, 1941, Public No. 11 (55 Stat. 31) and Act of March 27, 1941, Public No. 23 (55 Stat. 53). In due course, upon bill rendered, the United States paid to the Seaboard for transportation of this shipment the sum of $2,608.70.

During the same month several shipments aggregating twenty-two (22) carloads of superphosphate, property of the United States, were transported over the Seaboard from Nichols, Florida, to Tampa, Florida, likewise consigned to the British
76 Ministry of War Transport. These shipments also moved for export, and were exported, to England under the Lend-Lease Program. Upon bill rendered, the United States paid to the Seaboard for transportation of these shipments the sum of $546.17. On all shipments the Seaboard's charge was computed at full commercial tariff rates for like services to the general public.

In August, 1942, upon post audit, the United States notified the Seaboard that it took exception to the bills for $2,608.70 and $546.17, both of which it had already paid in full. It was claimed that the bills in question included overcharges in the respective amounts of $472.81 and $164.73, or a total overcharge of $637.54. Accordingly, this amount was deducted from the unpaid bill for $733.79 covering the shipment of wood pulp above mentioned, and the balance of $96.25 only was paid.

The exception taken by the United States to the bills rendered by the Seaboard for transportation of the phosphate rock and superphosphate shipments above described, was based upon the contention that these shipments constituted "military or naval property of the United States moving for military or naval and not for civil use," within the meaning of Section 321 (a) of the Transportation Act of 1940.[1] If this contention be sound,
77 the shipments were entitled to move subject to so-called "land grant" deductions from the full commercial rates, as hereinafter explained. It is not disputed that the deduction made was accurately computed. But, as set forth in petitioners' Reply to Counterclaim, "petitioners deny that said phosphate rock and superphosphate were military or naval property of the United States moving for military or naval and not for civil use, and entitled to land-grant deductions."

No controversy exists as to the validity of the claim sued upon independently of the foregoing counterclaim set up by way of defense. If the counterclaim asserted is valid, the suit should be dismissed, and if not valid, judgment should be rendered the plaintiffs in accordance with the prayer of the petition. This is agreed upon between the parties and so appears from the stipulation.

Reduced to simple terms, the question is whether the phosphate rock and superphosphate constituting the shipments involved, constituted "military or naval property of the United States moving for military or naval and not for civil use" within the meaning of the Transportation Act of 1940.

The contentions of the respective parties have been ably presented by both oral argument and briefs.

In approaching the subject it is helpful to give some consideration to the history of both the Transportation Act and the Lend-Lease Act.

78 During the early years of expanding railroad development the United States granted public lands to numerous railroads, particularly in the West and to many in the South. The underlying policy of the Government was to encourage the building of railroads in unsettled or sparsely settled areas to facilitate the development of such areas and to ultimately afford additional markets and sources of produce to the more congested sections of the country and to provide a means of transporting troops and military equipment in time of need. Among the roads

[1] "SEC. 321 (a). Notwithstanding any other provision of law, * * * the full applicable commercial rates * * * shall be paid for transportation by any common carrier subject to the Act of any * * * property of the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States * * * when such members are traveling on official duty; * * *."

to which such grants were made were certain corporations which were predecessors in title of the Seaboard (the plaintiff here). This result in respect of the Seaboard was accomplished through grants directly to the State of Florida and by that State in turn to such corporations. The original grant was made for the construction of a main line of railroad from Fernandina to Tampa Bay and a branch line from Waldo to Cedar Key and contained the following condition:

"and the said railroad shall be and remain a public highway for the use of the Government of the United States, free from toll or other charges upon the transportation of any property or troops of the United States." Act of May 17, 1856 (Section 3) (11 Stat. 15).

Similar conditions were imposed by the terms of other grants.

In Lake Superior and Mississippi Railroad Company v. United States, 93 U. S., 442 (decided in 1877), the Supreme Court construed the condition of such grant as reserving to the
79 Government only the free use of the road bed as a highway but held that the railroad could not be required to transport over such road troops or property of the Government free of charge.

Following the foregoing decision the Court of Claims held, that by reason of the right of the Government as provided in the reservation to use the road bed, a reduction of fifty per cent in rates should be allowed by the railroad in transporting such property. Thus the Government bore 50% of the total burden of such transportation in the form of its right to use the road bed and the railroad was paid the remaining 50% as compensation for the use and operation of its equipment.[3]

In 1924 an act was passed by Congress vesting in the Secretary of War authority to fix such rates for the transportation of property or troops of the United States over land grant roads as he deemed just and reasonable, but not exceeding 50% of the full amount of compensation for like transportation performed for the public at large. Act of June 7, 1924, c-291, Title I, 43 Stat., 486; 10 U. S. C. A., 1375. By virtue of the decisions cited and the Act of 1924, the railroads transported over those portions of their respective lines constituting the "land grant" portions, all property of the United States, as well as troops without limitation as to the nature of the property.

80 Attention is directed to the fact that the Secretary of War was the official designated under that Act to fix the rates. Such designation was probably due to the recognition by

[3] A. T. & S. F. R. R. Co. v. United States, 15 Court of Claims Reports, 126.

Congress of the fact that the bulk of railroad traffic in which the Government was interested was military property.

Being desirous of participating in the traffic, competing lines not subject to the so-called land grant rates entered into what has been designated as "equalization agreements" to meet the rates of the "land grant" roads. With such agreements the case at bar is not concerned except as suggesting the far reaching effects on the rate structure of the roads as applied to Government traffic.

Expanding governmental activities during the period following the passage of the Act of 1924, caused an unprecedented increase in the movement over these railroads of vast quantities of property of the United States and a corresponding increase in the travel of civilian employees charged with the administration of these activities. All such traffic was entitled to move at 50% of the regular commercial rates. This traffic was excluded from the benefits of the reduced rates by the Transportation Act of 1940, enacted pursuant to recommendations of Committees appointed by the President and by the War Department.[3]

81 In its brief the Government suggests that in enacting the Transportation Act of 1940 Congress had in mind the probable involvement of this Country in war in the near future, and it is contended that the words "military or naval property of the United States moving for military or naval and not for civil use" must be interpreted in the light of conditions then existing.[4]

In March 1941, after eighteen months of hostilities in Europe and with German and Italian conquests expanding, Congress enacted legislation designed to "further * * * promote the defense of the United States, and for other purposes," known as the Lend-Lease Act. Public Law 11, 77th Congress, Chapter 11, First Session, H. R., 1776. At that time England stood alone and concern regarding a realization of a Japanese threat to the United States mounted.

The Act confers upon the President almost unlimited discretionary powers and among others (Section 3) "to manufacture * * * or otherwise procure * * * any defense

82 article for the government of any country whose defense the President deems vital to the defense of the United States", and "To Sell, transfer title to, exchange, lease; lend, or otherwise

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[3] See House Document No. 583 of the 75th Congress, 3rd Session; Hearings, 76th Congress, House Committee on Interstate and Foreign Commerce, H. R. 2531, Vol. I, pp. 259–308, at pages 271–2; Report of Hearings House Committee on Interstate and Foreign Commerce, 75th Congress, pp. 16–17.

[4] In reconstructing the scene, passing reference may be made to some of the more important related legislative enactments of the period, with the respective dates. Alien Registration Act, 1940, 540 Stat., 673, June 28, 1940; Army Reserve and Retired Personnel Service Law of 1940, 54 Stat., 858, August 27, 1940; Selective Training and Service Act of 1940, 54 Stat., 885, Sept. 16, 1940; Alien Veterans' Act, 54 Stat., 1149, Oct. 14, 1940; Soldiers and Sailors Civil Relief Act of 1940, 54 Stat., 1178, Oct. 17, 1940. The Alien Agency Act, 54 Stat., 631, had been amended on August 7, 1939. The Neutrality Acts were the subject of Congressional action in 1940. Other references to contemporary occurrences might be made.

dispose of, to any such government any defense article * * * after consultation with the Chief of Staff of Army or the Chief of Naval Operations of Navy, or both. * * *." And "* * * to lease for export any defense article disposed of in any way * * * to any such government." The term "defense article" is defined as meaning, among other things, "any agricultural, industrial or other commodity or article for defense." The term is further defined as including any article manufactured or procured pursuant to Section 3 or to which the United States or any foreign government had or thereafter acquired title, possession or control. Provision is made that the President shall transmit to Congress reports of operations under the Act.

This legislation has been supplemented from time to time by various acts appropriating necessary funds and as of September 25, 1944, seventeen reports of such operations had been submitted to Congress.

It is stipulated that the property involved in the instant case was being transported for the United States; that the property constituted "defense articles", as defined in the Lend-Lease Act; that when requisition is made by any country the defense of which the President deems vital to the defense of the United States,
83 such requisition is carefully considered and scrutinized and is issued, modified or rejected in accordance with the determination by the President or his properly authorized representative as to whether or not such shipment will promote the defense of the United States in accordance with the provisions of the Act. It is further stipulated that either party may refer to the official published reports made to Congress by the President as provided in the Act and to Rules of the Comptroller General without the formal introduction of such Reports and Rules.

To reach a determination of this case the Court must determine whether under the Transportation Act of 1940 the phosphate rock and superphosphate was, first, military or naval property of the United States, and second, moving for military or naval and not for civil use. Both queries require an affirmance in order to sustain the Government's position.

The second question does not involve a consideration of the nation by which the property might be put to military or naval use. Such use of the property by a power other than the United States would seem to be such military or naval use as would be sufficient for the requirement of the Act.

While phosphate rock and superphosphate may be used for various purposes, it is stipulated that the shipment here involved was destined for use as agricultural fertilizer supplied the farmer in Great Britain under the Lend-Lease Act and was moving over

a land-grant railroad. The stipulation contains the following language:

84 "In 1941, at the times the requisitions for the materials involved in the counterclaim were made, approved and authorized, and the shipments moved, there was a serious food situation in Great Britain, by virtue of the fact that Great Britain, normally a heavy food-importing nation, was cut off from many sources of supply. Imports were further restricted by shortage of shipping. Great Britain therefore found it necessary to revise her agricultural practices in order to intensify production of food for direct human consumption. It was necessary to put into production a large acreage of land normally not used for the production of food for direct human consumption, and phosphate fertilizers had to be imported and distributed to effectuate this revised agricultural program. The shipments of phosphate rock and superphosphate comprised a part of that program. Great Britain instituted controls which resulted in the proper use and distribution of said materials to accomplish this purpose, for which they were requisitioned and authorized under the Lend-Lease Act."

The Lend-Lease Act contains no language indicating an intention on the part of Congress to modify the terms of the Transportation Act nor does it define materials acquired thereunder as being intended or destined for military or naval use unless it be considered that the term "defense" as there employed necessarily implies such use. It is urged that in waging modern warfare all resources of a country are mobilized and articles heretofore considered as nonmilitary assume such character in conducting what has been termed "total war." England has been likened to a besieged fortress and it is contended that such assistance as was rendered that country was assistance in carrying on the war in a military sense. The contention of the Government is briefly

85 summed up in the following quotations from its brief:

"In an integrated war economy, the supply of raw materials, the exploitation of the industrial plant, and the utilization of the land for food production are directly related to war. With modern science and changed methods of war transforming many substances once considered unimportant for a belligerent's purposes into strategic military material, the general language 'military property' cannot be limited to the precise items which would have been embraced within it centuries ago."

And further:

"It is not suggested that food stuffs, or phosphate are necessarily 'military property,' as such. However, under the particular conditions of war or defense, they can become indispensable to military functioning. When owned by the United States, and

devoted to a war or defense use, they take on a character of military property. Military and nonmilitary articles can be classified only after appropriate consideration has been given to the pressures, the exigencies and the practice of the times. Thus, even when food was not considered to be contraband unless moving for direct army use, it was recognized that the proclamation of a warring government could impress it with the character of contraband." Citing Balfour, Guthrie and Company v. Portland and Asiatic S. S. Company, 167 Fed. 1010 (D. Ore.); Spiegel, Economics of Total War (1942), p. 287.

This line of reasoning, if followed to its logical conclusion, would obliterate any distinction between the civilian and the military in time of war.

In adopting the language of the Transportation Act, Congress recognized a distinction between military or naval property and other property of the Government and it recognized the distinction between military or naval property moving for
86 military or naval use and such property moving for civil use. As has been pointed out, the Act was passed at a time when there existed a threat of involvement of this country in total war on a world-wide stage, the serious nature of which is realized when it is recalled that the threat resulted in an accomplished fact within less than fifteen months from the time Congress acted. The United States along with the world, was a close observer of the methods of waging "total war" and Congress was fully aware that modern wars engage the full resources of belligerent nations. Nevertheless, the Act clearly recognizes the distinction between the civil and the military. Appropriate language might have been used basing the exception upon the existence of a state of war, but this was not done.

An examination of the reports made to Congress by the President of the operations under the Lend Lease Act shows the nature of the property transferred to be almost as various as the property itself and as varied as the nations participating. For example, the report of August 24, 1944, lists 46 foreign countries as participating and the articles distributed embrace, among other things, ordnance and combat ships upon the one hand and dried beans and skimmed milk upon the other. Beginning in December 1941, 1,300,000 small children received a regular supply of concentrated orange or black currant juice and of cod liver oil compound.

While the agencies employed in acquiring these varied articles are not specifically reflected in respect of each item,
87 the Lend Lease Act and the Defense and Supplemental Appropriation Act provide for authorization by the President in this connection of not only the Secretary of War and

the Secretary of the Navy, but the head of any other department or agency of the Government.

In the several reports a distinction is drawn between military and nonmilitary goods. For example, in the report of August 24, 1944, Table No. 3, appearing on page 11, is denominated: "Quantities of Non-Military Goods Transferred," and among other items lists fertilizer—the article with which we are now concerned. Similar instances appear at many places in the various reports and innumerable illustrations of the transfer of articles strictly for use by civilians might be shown.

It would appear that Congress adopted or approved this interpretation. The President has repeatedly reported to Congress the distribution of huge quantities of nonmilitary and distinctly civilian goods and with these reports before it Congress has endorsed and approved this course by enabling its continuance by the enactment of the necessary appropriation acts.

The construction given to a statute by the Executive Department charged with its administration is entitled to great weight.[5]

Fertilizer is an article of value defensively. That fact has been determined by the President and stipulated by the
88 parties and the Court and has no authority to review or inquire into such determination. But does the identity of an article as being of value or use in defense of the nation necessarily imply a military or naval and not civil use? It may have a potential military value. Phosphate concededly does have value or use in the manufacture of munitions but that is not the use to which this particular shipment was moving.

Among other definitions, Funk and Wagnalls Standard Dictionary of the English Language, defines "defense" as: "To defend; vindicate; fortify * * *;" and "defend" as: "To protect or shield from attack or violence; guard against threatened or offered harm; to make a stand for, or uphold by force or argument; maintain against attack, encroachment or opposition; maintain; vindicate, as to defend the course of the administration * * *."

"Military" is defined as: "Of or pertaining to soldiers, arms or warfare * * * soldierly, warlike; martial; done, supported, or carried on by force of arms; assigned to or occupied by troops."

"Civilian" is defined as: "One who follows civil pursuits as distinguished from military, naval or clerical."

"Civil" means: "Pertaining to a citizen in regard to ordinary affairs; opposed to ecclesiastical or military."

Unless technically employed, language is to be given its ordinary meaning and from the definitions cited it follows that while the

[5] U. S. v. Jackson, 280 U. S., 183; U. S. v. American Trucking Association, 310 U. S., 534; National Lead Company v. U. S., 252, U. S., 140.

term "defense" may and often does carry with it the idea of force, it does not necessarily mean the use of physical
89 force. Upon the contrary it may, and often does mean the employment of efforts unrelated to physical force. Translated to terms of the individual it may mean the peaceful application to a court of law for protection against a threat to property. On the part of the state it may mean draining a swamp to defend the health of the citizens or the construction of housing projects to provide accommodations for civilians employed in industries producing war materials.

Between the terms "military" and "civil" there is a wide distinction. "Military use" or "martial use," which may be considered for the present purpose as embracing "naval use," suggests the thought of physical force with destruction as its exclusive ultimate aim. It does not carry with it the idea of even constructive force. The bridge erected by the engineers is not a bridge for use by those engaged in peaceful civilian pursuits, but is a mere temporary expedient to be utilized in advancing while seeking out the enemy to destroy him.

Among other agencies of the Government created for the specific purpose of aiding in the prosecution of the war are the Office of Price Administration and the War Production Board, the underlying purpose of both being to combat financial inflation and resulting confusion on the home front. In addition to agencies of such nature, the regular civilian establishments of the Government are charged with responsibilities essentially related to the war effort. For example, upon the United States Attorney rests among other duties those of prosecuting persons
90 charged with evading service in the armed forces and acquiring sites for training those called to such service.

It could hardly be contended that a typewriter or other supplies for use of any of those agencies is military or naval property of the United States or that it is moving for military or naval and not civil use.

If such a construction should be placed upon the Transportation Act, the words "and not civil" would have no meaning, although those words were obviously intended to have a meaning and were employed at a time and under circumstances indicating danger of war.

I am unable to draw a distinction under the Transportation Act between the status of fertilizer moving for use by a farmer in Cornwall or a farmer in Haiti under the Lend-Lease Act, and fertilizer moving for use by a farmer in the middle west furnished by the Government under appropriate provisions of the Agricultural Adjustment Administration. All are engaged in the pro-

duction of agricultural products essential for the successful prosecution of the war. All are producing with fertilizer which moved as property of the United States; all are engaged in one of the most traditional of all civilian occupations, constituting the antithesis of destructive effort and as far removed from martial activities as can be imagined, and all are working to supply their respective markets with such surplus as may be available.

91 It is therefore my conclusion that the phosphate rock and superphosphate, within the meaning of the Transportation Act, was not military or naval property of the United States and was moving for civil use; that the counterclaim asserted by the Government should be dismissed and judgment should be rendered the plaintiffs in accordance with the prayer of the petitioner.

(S) STERLING HUTCHESON,
United States District Judge.

NORFOLK, VIRGINIA, March 24, 1945.

92 In United States District Court

Civil Action No. 321

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY, PETITIONERS

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

Order entering judgment and dismissing counterclaim

Entered and filed April 9, 1945

This day came the parties, by their attorneys, and the Court has fully considered the questions arising upon the pleadings and proofs, and arguments of counsel thereon, all the facts having been stipulated by the parties in writing filed in this Cause. The Court adopts the facts as stipulated as its findings of fact. The Court is of the opinion for reasons stated in writing filed in the Cause on March 24, 1945, setting forth its conclusions of law, that the petitioners are entitled to recover, and doth so decide and that the defendant is not entitled to recover on its counterclaim. Accordingly, the Court doth adjudge, order and decree that the said Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of the Properties and Assets of Seaboard Air Line Railway Company, do recover of the United States of America, the sum of Six Hun-

dred and Thirty-seven Dollars and Fifty-four Cents ($637.54), and its costs as provided by law. It is further adjudged, ordered and decreed that the counterclaim filed by the defendant is hereby dismissed and that this case be removed from the docket.

(Sgd.) STERLING HUTCHESON,
United States District Judge.

Dated at Norfolk, Virginia, April 9, 1945.

96 **Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit**

No. 5406

UNITED STATES OF AMERICA, APPELLANT

vs.

LEGH R. POWELL, JR. AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY, APPELLEES

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk

July 27, 1945, the transcript of record is filed and the cause docketed.

August 3, 1945, the appearance of W. R. C. Cocke and F. S. Sargeant is entered for the appellees.

August 7, 1945, the appearance of Thomas L. Preston is entered for the appellees.

September 10, 1945, the appearance of Harry H. Holt, Jr., U. S. Attorney, and Walkley E. Johnson, Assistant U. S. Attorney, is entered for the appellant.

September 12, 1945, stipulation to continue case to the November term, 1945, is filed.

Order continuing case to November Term, 1945

Filed September 15, 1945

[Style of Court and title omitted.]

Upon the stipulation of the parties hereto, and for good cause shown, it is ordered that the above entitled case be, and it is
97 hereby, continued from the October Term to the November Term, 1945.

September 13, 1945.

JOHN J. PARKER,
Senior Circuit Judge.

October 11, 1945, the appearance of John F. Sonnett, Hubert F. Margolies and Frederick Chait is entered for the appellant.

October 12, 1945, petition of appellant for permission to file brief in excess of fifty printed pages is filed.

Same day, order granting special permission to appellant to file brief in excess of fifty printed pages but not exceeding one hundred printed pages is filed.

October 16, 1945, brief and appendix on behalf of the appellant are filed.

Same day, petition of appellees for permission to file brief in excess of fifty printed pages is filed.

October 18, 1945, order granting special permission to appellees to file brief in excess of fifty printed pages but not exceeding seventy-five printed pages is filed.

October 31, 1945, brief on behalf of the appellees is filed.

Argument of cause

November 7, 1945 (November term, 1945), cause came on to be heard before Soper and Dobie, Circuit Judges, and Barksdale, District Judge, and was argued by counsel and submitted.

98 In United States Circuit Court of Appeals,
Fourth Circuit

No. 5406

UNITED STATES OF AMERICA, APPELLANT

vs.

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY, APPELLEES

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk

(Argued November 7, 1945.—Decided December 13, 1945)

Before SOPER and DOBIE, Circuit Judges, and BARKSDALE, District Judge

Opinion

Filed December 13, 1945

99 Hubert H. Margolies, Attorney, Department of Justice, (John F. Sonnett, Assistant Attorney General; Harry H. Holt, U. S. Attorney; Walkley E. Johnson, Assistant U. S. Attor-

ney; Frederick Chait and Irvin M. Gottlieb, Attorneys, Department of Justice, on brief) for Appellant; and Thomas L. Preston (W. R. C. Cocke and F. S. Sargeant on brief) for Appellees.

DOBIE, Circuit Judge:

This case involves only one question. Phosphates, owned by the United States (hereinafter called Government) where shipped over the Seaboard Air Line Railway (hereinafter called Seaboard), consigned to the British Ministry of War Transport under the Lend-Lease Act, for use as fertilizer by the farmers of Great Britain. Did these phosphates fall within the category "military or naval property of the United States moving for military or naval and not for civil use", as those words were used in Section 321 (a) of the Transportation Act of 1940? The District Court decided this question in the negative and thus determined that Seaboard was entitled to collect from Government the full commercial freight rates, rather than the reduced rates specified for such property moving over Land Grant Railroads. Government has appealed.*

100 So far as it is pertinent here, Section 321 (a) of the Transportation Act of 1940 reads:

"Notwithstanding any other provision of law, * * * the full applicable commercial rates * * * shall be paid for transportation by any common carrier subject to the Act of any * * * property for the United States or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use * * *."

To us, the opinion of Judge Hutcheson (60 F. Supp. 533) is so clear and its reasoning so cogent that we might well affirm the judgment below and adopt that opinion of our Court. We shall content ourselves with a brief opinion.

Government contends that, at the time of the enactment of the Transportation Act, England was in a desperate plight in World War II, and that, since this titanic struggle involved and deeply touched the lives of all the citizens of a warring country, the phrase "military or naval" must be given a very broad meaning. With this we heartily agree. We also give cheerful assent to Government's assertion that the Lend-Lease Act was enacted as a defense measure, not as a program of humanitarian charity. But we cannot go along with Government's contention that, as a neces-

*In connection with this case, the following extract from United States Law Week, November 27, 1945, Volume 14, No. 20, may be of interest: "Conference Agrees on Land Grant Rate Repeal—Senate and House conferees last week unanimously adopted a report on H. R. 694, which would repeal land grant railway rates pursuant to which the United States, in return for vast grants of land to certain railroads, had been entitled to substantially lower freight rates than those charged to other shippers on such roads."

sary consequence, all goods, regardless of their nature, function, or use, shipped to England under the Lend-Lease Act were "military or naval property," "moving for military or naval and not for civil use," as these words were used in the Transportation Act.

The Transportation Act was passed before the Lend-Lease Act. Sympathies in this country then ran strongly against the
101 Axis powers; it was pretty generally agreed that we should help the enemies of the Axis; there was real fear that the United States might become involved in the conflict; swift measures for defense had to be perfected on an extremely wide scale. Yet, with this picture before it, we must presume that Congress deliberately used the words "military or naval" in their generally accepted meaning. And we cannot accept Government's statement that the words "not for civil use" in the Transportation Act were mere surplusage. On the contrary, we think those words clearly show a distinction (however difficult in practice) between the military or naval on the one hand, and the civil on the other hand. Had this not been the Congressional intention, appropriate words for that purpose were readily available.

And even stronger reason against the Government's contention is the fact that the whole history and administration of the Lend-Lease Act show definitely that two separate types of assistance were contemplated: (1) military or naval; (2) civil. Nowhere is this more cogently shown than in the numerous reports of President Roosevelt to Congress on just what had been done in administering the Lend-Lease Act. On the strength of these reports, Congress continued to make further Lend-Lease appropriations and no amendment of the Transportation Act was made or sought.

A few items from these reports of the President (which could be indefinitely multiplied) must suffice. Thus Chapter 3 of the Fourth Report (pages 19–21) expressly divides Lend-Lease goods already shipped into three classes: (1) Military, (2) Industrial, and (3) Agricultural. A like classification is found in the
102 Fifth Report (page 9). The same is true of the Seventh Report where (page 9) it is stated: "Exports of *military* items have arisen much more rapidly than exports of *nonmilitary* items." [Italics ours.] The Third Report (pages 24–26) mentions the appearance of Lend-Lease Goods "on the grocers' shelves and in the kitchens of Great Britain," and states that 1,300,000 small children were receiving "a regular supply of concentrated orange or black-current juice, and of cod liver oil compound." The Tenth Report (page 20) mentions "supplies needed to prevent a breakdown of the *civilian* economy." [Italics ours.] Finally, in the Fifteenth Report (page 38) we find: "*Civilian* supplies shipped to French Africa under Lend-Lease. * * * We have

sent to Tunisia and Morocca, for example, equipment to increase production of the phosphate mines. The fertilizer produced by these mines is needed both for the United Kingdom's intensive food production program and for the restoration of food production in the liberated areas of occupied Europe." [Italics ours.]

The last quotation seems to bear directly on the instant case. For here we have phosphate mines connected only with the production of fertilizer; the use of fertilizer associated with agriculture; the whole designated and included within the clear category of Civilian supplies.

The judgment of the District Court is affirmed. Affirmed.

103 United States Circuit Court of Appeals, Fourth Circuit

No. 5406

UNITED STATES OF AMERICA, APPELLANT

vs.

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF THE SEABOARD AIR LINE RAILWAY COMPANY, APPELLEES

Appeal from the District Court of the United States for the Eastern District of Virginia

Judgment

Filed and Entered December 13, 1945

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

MORRIS A. SOPER,
U. S. Circuit Judge.
ARMISTEAD M. DOBIE,
U. S. Circuit Judge.
A. D. BARKSDALE,
U. S. District Judge.

104 On another day, to wit, January 14, 1946, the mandate of this Court, in this cause is issued and transmitted to the District Court of the United States for the Eastern District of Virginia, at Norfolk, in due form.

105 Supreme Court of the United States

[Title omitted.]

Stipulation

Subject to this Court's approval, it is hereby stipulated and agreed, by and between the attorneys for the respective parties hereto, that for the purpose of the petition for a writ of certiorari the printed record may consist of the following:

1. Appendix B to brief for appellant in the United States Circuit Court of Appeals for the Fourth Circuit.

2. The proceedings had before the United States Circuit Court of Appeals for the Fourth Circuit, including the opinion of said Court.

It is further stipulated and agreed that petitioner will cause the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit to file with the Clerk of the Supreme Court a complete certified transcript of the record on appeal in the Circuit Court of Appeals for the Fourth Circuit; and that, in the event the petition for writ of certiorari is granted, the printed record shall consist of the proceedings in the Circuit Court of Appeals for the Fourth Circuit, including the opinion of said Court, and such portions of the complete transcript of record on appeal in that court as the parties may designate.

It is further stipulated and agreed that either of the
106 parties hereto may refer in his brief to the record filed in the Supreme Court of the United States.

Dated this 4th day of March 1946.

J. Howard McGrath,
J. Howard McGrath,
Solicitor General,
Attorney for Petitioner.

W. R. C. Cocke,
Thomas L. Preston,
F. S. Sargeant,
Attorneys for Respondents.

107 In United States Circuit Court of Appeals

Order authorizing clerk to use original transcript of record in making up record for use in the Supreme Court of the United States on application for writ of certiorari

For reasons appearing to the Court, it is ordered that the Clerk of this court, in making up certified transcripts of records for use in the Supreme Court of the United States on applications

for writs of certiorari to this Court, be, and he is hereby, authorized to use and incorporate therein the original transcript of records filed in this Court. The said original transcripts of records shall be returned to this Court after the cases are finally disposed of in the said Supreme Court.

Further ordered that a copy of this order be incorporated in said certified transcripts of records.

JOHN J. PARKER,
Senior Circuit Judge.

JANUARY 9th, 1941.

108 [Clerk's certificate to foregoing transcript omitted in printing.]

109 Supreme Court of the United States

Order allowing certiorari

Filed April 29, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON took no part in the consideration or decision of this application.

110 In the Supreme Court of the United States

Stipulation

Filed Aug. 8, 1946

Subject to this Court's approval, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that for the consideration of this case on the writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted April 29, 1946, the printed record may consist of the following:

1. The material contained in the printed transcript of record (consisting of 30 pages) used for the purposes of the petition for writ of certiorari herein.

2. The following additional portions of the complete transcript of the record on appeal in the Circuit Court of Appeals:

a. Respondents' petition in the District Court of the United States for the Eastern District of Virginia, and exhibit thereto.

b. Petitioner's answer and counterclaim.

c. Respondents' reply to petitioner's counterclaim.

111 d. Exhibits 1 and 3 (a) to the Stipulation of Facts consisting of copies of bills of lading numbered respectively DA–TPS–190186 and DA–TPS–190194 which are stipulated and agreed to be typical of the bills of lading covering the shipments involved in the above-entitled case.

e. Exhibit 2 to the Stipulation of Facts consisting of a copy of Seaboard Air Line Railway Company's bill (TD–130–140) for $2,608.70, which is stipulated and agreed to be typical of its bills rendered by said company for transportation charges on the shipments involved in the above-entitled case.

f. Exhibit 5 to the Stipulation of Facts consisting of a copy of the Comptroller General's decision B–29861, dated October 12, 1943.

g. The second page of Exhibit 7 to the Stipulation of Facts, the said page being entitled "Invitation, Bid, and Acceptance," and forming a part of the contract covering the purchase of the superphosphate involved in the above-entitled case.

h. "Exhibit A" to the Supplemental Stipulation of Facts, consisting of a copy of letter dated September 21, 1943 from E. R. Stettinius, Jr., Lend-Lease Administrator, to Roy F. Hendrickson, Deputy Food Administrator, War Food Administration.

3. This stipulation.

It is further stipulated and agreed that in the briefs and argument of either party reference may be made to any portion of the transcript of record which is not included in the printed record prepared as aforesaid and that either party may refer to the official published reports made to Congress by or on behalf of the President pursuant to the terms of the Lend-Lease Act.

Dated this sixth day of August 1946.

J. Howard McGrath,
J. Howard McGrath,
Solicitor General,
Attorney for Petitioner.

W. R. C. Cocke,
W. R. C. Cocke,
Thomas L. Preston,
Thomas L. Preston,
F. S. Sargeant,
F. S. Sargeant,
Attorneys for Respondents.

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No. 942 56

In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES, PETITIONER

v.

LEIGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 942

UNITED STATES, PETITIONER

v.

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, entered in the above-entitled case on December 13, 1945.

OPINIONS BELOW

The opinion of the District Court of the United States for the Eastern District of Virginia, Norfolk Division (R. 8–23), is reported in 60 F. Supp. 433. The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 25–28) is reported in 152 F. 2d 228.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 13, 1945. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether phosphates owned by the United States and consigned to the British Ministry of War Transport under the Lend-Lease Act, 55 Stat. 31, 22 U. S. C., Supp. IV, 411–419, for use as farm fertilizer in Great Britain, are "military or naval property of the United States moving for military or naval and not for civil use," within the meaning of Section 321 (a) of the Transportation Act of 1940, 54 Stat. 898, 954, 49 U. S. C. 65 (a), and are, therefore, entitled to move at land-grant rather than commercial freight rates.

STATUTES INVOLVED

The relevant portions of the Transportation Act of 1940 and the Lend-Lease Act are set forth in the Appendix, *infra*, pp. 14–19.

STATEMENT

The basic facts were stipulated by the parties (R. 1–7). In July 1942, the Seaboard Air Line Railway Company[1] billed the United States for certain freight charges amounting to $733.79 (R. 1). The United States did not question the

[1] Hereinafter referred to as the respondent.

correctness of the charges but deducted from the amount billed the sum of $637.54 and paid respondent the balance of $96.25 (R. 1). Respondent accepted that amount as part payment only and instituted this action in the United States District Court for the Eastern District of Virginia to recover the $637.54 withheld (R. 1). The United States filed its counterclaim for the same amount (R. 1).

The controversy over the amount in suit arose in connection with shipments of 78 cars of phosphate rock and superphosphate over the respondent's railroad in August 1941 on Government bills of lading (R. 1–4). The phosphates so shipped were the property of the United States and were consigned to the British Ministry of War Transport (R. 1–2, 4), a duly authorized representative in the United States of His Majesty's Government in the United Kingdom (R. 4). They were shipped under the Lend-Lease Act, for export to Great Britain and for use there as farm fertilizer (R. 4, 6). Respondent billed the United States for and the United States paid the transportation charges on these shipments at the "commercial rate" (R. 2–3). Thereafter, the General Accounting Office of the United States took exception to these payments, on the ground that the shipments were of military property "subject to land grant deductions," and notified respondent accordingly (R. 2–3). See Section 322 of the Transportation Act of 1940, 54 Stat. 898, 955, 49 U. S. C. 66, Ap-

pendix, *infra*, pp. 15–16. The difference between the "commercial rate" and the "land grant" rate on these shipments amounted to $637.54 (R. 2–3).

The parties also stipulated that the shipments involved were of "defense articles," as defined in Section 2 of the Lend-Lease Act (Appendix, *infra*, p. 16), that when requisition is made by any country, the defense of which the President of the United States deems vital to the defense of the United States, such requisition is considered and scrutinized; that it is accepted, modified, or rejected in accordance with the determination by the President or his representative, such as the Lend-Lease Administrator or the Foreign Economic Administration, as to whether or not shipment of the requisitioned materials will promote the defense of the United States in accordance with the provisions of the Lend-Lease Act; that "In 1941, at the times the requisitions for the materials involved in the counterclaim were made, approved and authorized, and the shipments moved, there was a serious food situation in Great Britain, by virtue of the fact that Great Britain, normally a heavy food importing nation, was cut off from many sources of supply"; that it was necessary for Great Britain to intensify production of food for "direct human consumption" and for this purpose to use phosphate fertilizers; that "the shipments of phosphate rock and superphosphate comprised a part of that program"; and that "Great Britain instituted controls which resulted

in the proper use and distribution of said materials to accomplish this purpose, for which they were requisitioned and authorized under the Lend-Lease Act." (R. 5–6).

The parties further stipulated that if the phosphates "were at the time of their transportation by the Seaboard 'military or naval property of the United States moving for military or naval and not for civil use' within the meaning of Section 321 (a) of the Transportation Act of 1940, Appendix, *infra*, p. 14, the counterclaim asserted by the United States is valid and should be allowed in the amount stated" (R. 4–5).

The district court held that the respondent was entitled to commercial rates, and accordingly entered judgment for respondent for $637.54, and dismissed the counterclaim (R. 8). On appeal to the circuit court of appeals, the judgment of the district court was affirmed (R. 28).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Fourth Circuit erred:

1. In holding that the United States was not entitled to land-grant rates on the shipment of phosphates under the Lend-Lease Act for use in Great Britain.

2. In holding that such phosphates, belonging to the United States and exported to Great Britain pursuant to the Lend-Lease Act for use as farm fertilizer in Great Britain, were not "military or naval property of the United

States," within the meaning of Section 321 (a) of the Transportation Act of 1940.

3. In holding that such phosphates, belonging to the United States and shipped on consignment to the British Ministry of War Transport, pursuant to the Lend-Lease Act, for export to Great Britain for use there as farm fertilizer, were not "moving for military or naval and not for civil use," within the meaning of Section 321 (a) of the Transportation Act of 1940.

4. In holding that not all "defense articles," within the meaning of the Lend-Lease Act, exported pursuant to the Lend-Lease Act, are "military or naval property of the United States," within the meaning of Section 321 (a) of the Transportation Act of 1940.

5. In holding that not all "defense articles," within the meaning of the Lend-Lease Act, exported under that Act, are "moving for military or naval and not for civil use," within the meaning of Section 321 (a) of the Transportation Act of 1940.

6. In affirming the judgment of the district court which had entered judgment for respondent and dismissed petitioner's counterclaim.

REASONS FOR GRANTING THE WRIT

1. Section 3 (a) of the Lend-Lease Act provides that "the President may * * * when he deems it in the interest of national defense", au-

thorize "the Secretary of War, the Secretary of the Navy, or" the head of any government agency to "sell, transfer title to, exchange, lease, lend, or otherwise dispose of" "any defense article" to "the government of any country whose defense the President deems vital to the defense of the United States." Appendix, *infra*, pp. 16–17. "Defense article" is defined in Section 2 (a) as including "any agricultural, industrial, or other commodity or article for defense", in addition to weapons, munitions, aircraft, vessels, and boats, means of making and repairing them, and parts thereof. Appendix, *infra*, p. 16.

Prior to the passage of the Transportation Act of 1940, the United States was entitled to the benefit of reduced rates for all Government property transported over Government-aided (land-grant) mileage. The Transportation Act of 1940 "makes certain concessions to carriers in the rates, fares, and charges applicable to the transportation of persons, property, and mail for the United States" (see *Santa Fe Pac. R. Co.* v. *Ickes*, 57 F. Supp. 984, 986 (D. D. C.)). by providing, *inter alia*, that "notwithstanding any other provision of law * * * the full applicable commercial rates, fares, or charges shall be paid for transportation" of property for the United States. Section 321 (a), Appendix, *infra*, p. 14. That Section provides further, however, that the full commercial rates "shall not apply to the trans-

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portation of military or naval property of the United States moving for military or naval and not for civil use".[2]

The court below noted that "The Transportation Act was passed before the Lend-Lease Act. Sympathies in this country then ran strongly against the Axis powers; it was pretty generally agreed that we should help the enemies of the Axis; there was real fear that the United States might become involved in the conflict; swift measures for defense had to be perfected on an extremely wide scale" (R. 26–27). It recognized that in view of Great Britain's "desperate plight" "at the time of the enactment of the Transportation Act", "the phrase 'military or naval' must be given a very broad meaning" (R. 26) and gave "cheerful assent to Government's assertion that the Lend-Lease Act was enacted as a defense measure, not as a program of humanitarian charity" (R. 26). Despite this verbal recognition of these crucial factors which must have been in the Congressional mind at the time of passage of both

[2] This exception to the requirement that the Government pay the full commercial rates has been repealed by the Act of December 12, 1945, Pub. No. 256, 79th Cong., 1st Sess., Appendix, *infra*, pp. 19–21. The repeal, however, is not effective until October 1, 1946, and therefore does not affect the shipments here involved or any "transportation specifically contracted for prior to such effective date."

the Transportation and Lend-Lease Acts,[3] however, the court below held the impact of the latter on the former to be non-existent, or, at best, negligible.

In so holding, we submit that the court below failed to give full effect to the Lend-Lease Act. Concededly, that Act was passed solely for the purpose of "defense" of the United States and the defense envisaged was a military defense and not a moral one. Any supplies consigned "in the interest of national defense" (See Section 3 (a) of the Lend-Lease Act, Appendix, *infra*, p. 16) must be moved for "military or naval" use, and it would seem to follow that any Government-

[3] That military and other defense measures were foremost in the Congressional mind at the time of passage of the Transportation Act of 1940 is clear, in part from the following chronology of Congressional enactments:

June 28, 1940—An Act To expedite national defense—54 Stat. 676.

July 2, 1940—An Act To expedite the strengthening of the national defense—54 Stat. 712.

September 16, 1940—The Selective Training and Service Act of 1940—54 Stat. 885.

September 16, 1940—An Act To Authorize the Reconstruction Finance Corporation to make loans for the development of deposits of strategic and critical minerals which in the opinion of the Corporation would be of value to the United States in time of war—54 Stat. 897.

September 18, 1940—The Transportation Act of 1940—54 Stat. 898.

owned property so used must, in turn, be military or naval property of the United States.[4]

The court below was in error in holding the land-grant rates inapplicable to the phosphate shipments in question, and its decision, in view of its effect upon the Government's lend-lease freight bill alone, is in direct conflict with the obvious Congressional purpose and policy in enacting Section 321 (a): to enable the Government to conduct its military operations with a minimum of expense. It does not follow that all Government shipments during the war were entitled to reduced rates, or that a reversal of the decision below would amount to reading the words "and not for civil use" out of Section 321 (a) of the Transportation Act of 1940. We do not contend that because World War II was a "total war", shipments of phosphates to be used as fertilizers by American farmers who produced food for the American civilian population would fall within the exception in the 1940 Act. Cf. R. 6. Such shipments might well move, in part, because of military considerations; but the purpose of the movement would generally be dual; it would be a movement of goods also motivated by the ever-present necessity of feeding the American people.

[4] Foodstuffs and phosphates were included in the list of items covered by Executive Proclamation under the Export Control Act, 54 Stat. 712, which, in terms, applies to "military equipment or munitions * * * or supplies necessary for the manufacture thereof * * *." See 6 F. R. 1300, 1301, 1540, 3584, and 3591.

By way of contrast, we think it plain that lend-lease goods "moved" for one purpose and one purpose alone. Cf. *Southern Pacific Co.* v. *United States*, 285 U. S. 240, 245.[5] As President Roosevelt said (Seventeenth Report to Congress on Lend-Lease Operations, pp. 7, 8):

> The lend-lease system is * * * a system of combined war supply, whose *sole purpose* is to make the most effective use against the enemy of the combined resources of the United Nations, regardless of the origin of the supplies or which of us uses them against the enemy.
>
> * * * * *
>
> Lend-lease and reverse lend-lease are a system of combined war supply. They should end with the war. [Italics supplied.]

This single purpose of lend-lease movements and the all but simultaneous termination of such movements[6] and of the land-grant rates serve, we suggest, to make manifest the error in the decision below, a decision which ascribes "civil" character to the movement of "defense articles", shipped in time of war under the Lend-Lease Act—"An Act to Promote the Defense of the United States"—to Great Britain, a "country whose defense the

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[5] Under Section 321 (a) of the Transportation Act (Appendix, *infra*, p. 14), the crucial test is the use for which Government-owned goods are "moving."

[6] See President Truman's Letter of Transmittal of August 30, 1945, Twentieth Report to Congress on Lend-Lease Operations, p. 5. See also Pub. No. 31, 79th Cong., 1st Sess., approved April 16, 1945, extending the life of the Lend-Lease Act until June 30, 1946. See *supra*, note 2, p. 8.

President deems vital to the defense of the United States." See enacting clause and Section 3 (a) (1) of the Lend-Lease Act, Appendix, *infra*, pp. 16–17.

2. Authoritative decision by this Court of the question here presented is of great importance to the Government. If the decision below was correct, the phosphates whose shipment is here in issue and innumerable other "defense articles", within the meaning of the Lend-Lease Act, shipped for export under that Act, could move only at the regular commercial freight rates, a result not lightly to be attributed to Congress, confronted with the problem of financing a vast military program. If, however, the decision below is, as we believe, erroneous, then the phosphates were entitled to move at the lower land-grant rates. While the difference between the applicable commercial rates and the land-grant rates amounts, in the instant case, to only $637.54, the financial importance of the question presented must be considered in terms of the effect of the decision below upon the freight bills to be paid by the Government for the carriage of hundred of millions, and perhaps billions, of dollars worth of "defense articles" shipped by the Government

under the Lend-Lease Act.[1] Petitioner has been advised by the Office of Foreign Liquidation Commissioner in the United States Department of State, the successor to the lend-lease functions of the Foreign Economic Administration, that if the decision below is correct "the cost of the lend-lease program would be increased by many millions of dollars, probably several hundred million dollars". See also 91 Cong. Rec. (daily ed., October 2, 1945) 9388; 91 Cong. Rec. (daily ed., November 30, 1945) 11448; H. Rep. No. 393, 79th Cong., 1st Sess., pp. 8–9; S. Rep. No. 552, 79th Cong., 1st Sess., pp. 9–10.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

J. HOWARD MCGRATH,
Solicitor General.

MARCH 1946.

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[1] It is worthy of note that of the $40,196,677,000 worth of goods transferred to foreign governments under the lend-lease program from March 1941 to October 1, 1945, only slightly more than half consisted of munitions. Twenty-first Report to Congress on Lend-Lease Operations, p. 37. It is submitted that the decision below leaves in doubt the freight rates to be paid by the Government upon the shipment, under the lend-lease program, of all goods transferred to foreign governments, with the exception of actual munitions.

APPENDIX

The Transportation Act of 1940, 54 Stat. 898, 49 U. S. C. 65 (a), *et seq.*, provides, in part, as follows:

PART II—RATES ON GOVERNMENT TRAFFIC

Government to Pay Full Rates

SEC. 321. (a) Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty; * * *.

(b) If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner pre-

scribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior, to the extent that the issuance of such patents may be authorized by law.

Deduction of Overpayments

SEC. 322. Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government

to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

The Lend-Lease Act (Act of March 11, 1941), 55 Stat. 31, 22 U. S. C., 411–419, provides, in part, as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as "An Act to Promote the Defense of the United States".

SEC. 2. As used in this Act—

(a) The term "defense article" means—

(1) Any weapon, munition, aircraft, vessel, or boat;

(2) Any machinery, facility, tool, material, or supply necessary for the manufacture, production, processing, repair, servicing, or operation of any article described in this subsection;

(3) Any component material or part of or equipment for any article described in this subsection;

(4) Any agricultural, industrial or other commodity or article for defense.

Such term "defense article" includes any article described in this subsection: Manufactured or procured pursuant to section 3, or to which the United States or any foreign government has or hereafter acquires title, possession, or control.

(b) The term "defense information" means any plan, specification, design, prototype, or information pertaining to any defense article.

SEC. 3. (a) Notwithstanding the provisions of any other law, the President may, from time to time, when he deems it in the interest of national defense, authorize the

Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government—

(1) To manufacture in arsenals, factories, and shipyards under their jurisdiction, or otherwise procure, to the extent to which funds are made available therefor, or contracts are authorized from time to time by the Congress, or both, any defense article for the government of any country whose defense the President deems vital to the defense of the United States.

(2) To sell, transfer title to, exchange, lease, lend, or otherwise dispose of, to any such government any defense article, but no defense article not manufactured or procured under paragraph (1) shall in any way be disposed of under this paragraph, except after consultation with the Chief of Staff of the Army or the Chief of Naval Operations of the Navy, or both. The value of defense articles disposed of in any way under authority of this paragraph, and procured from funds heretofore appropriated, shall not exceed $1,300,000,000. The value of such defense articles shall be determined by the head of the department or agency concerned or such other department, agency or officer as shall be designated in the manner provided in the rules and regulations issued hereunder. Defense articles procured from funds hereafter appropriated to any department or agency of the Government, other than from funds authorized to be appropriated under this Act, shall not be disposed of in any way under authority of this paragraph except to the extent hereafter authorized by the Congress in the Acts appropriating such funds or otherwise.

(3) To test, inspect, prove, repair, outfit, recondition, or otherwise to place in good

working order, to the extent to which funds are made available therefor, or contracts are authorized from time to time by the Congress, or both, any defense article for any such government, or to procure any or all such services by private contract.

(4) To communicate to any such government any defense information, pertaining to any defense article furnished to such government under paragraph (2) of this subsection.

(5) To release for export any defense article disposed of in any way under this subsection to any such government.

(b) The terms and conditions upon which any such foreign government receives any aid authorized under subsection (a) shall be those which the President deems satisfactory, and the benefit to the United States may be payment or repayment in kind or property, or any other direct or indirect benefit which the President deems satisfactory.

(c) After June 30, 1943, or after the passage of a concurrent resolution by the two Houses before June 30, 1943, which declares that the powers conferred by or pursuant to subsection (a) are no longer necessary to promote the defense of the United States, neither the President nor the head of any department or agency shall exercise any of the powers conferred by or pursuant to subsection (a); except that until July 1, 1946, any of such powers may be exercised to the extent necessary to carry out a contract or agreement with such a foreign government made before July 1, 1943, or before the passage of such concurrent resolution, whichever is the earlier.

(d) Nothing in this Act shall be construed to authorize or to permit the author-

ization of convoying vessels by naval vessels of the United States.

(e) Nothing in this Act shall be construed to authorize or to permit the authorization of the entry of any American vessel into a combat area in violation of section 3 of the Neutrality Act of 1939.

* * * * *

SEC. 8. The Secretaries of War and of the Navy are hereby authorized to purchase or otherwise acquire arms, ammunition, and implements of war produced within the jurisdiction of any country to which section 3 is applicable, whenever the President deems such purchase or acquisition to be necessary in the interests of the defense of the United States.

SEC. 9. The President may, from time to time, promulgate such rules and regulations as may be necessary and proper to carry out any of the provisions of this Act; and he may exercise any power or authority conferred on him by this Act through such department, agency, or officer as he shall direct.

SEC. 10. Nothing in this Act shall be construed to change existing law relating to the use of the land and naval forces of the United States, except insofar as such use relates to the manufacture, procurement, and repair of defense articles, the communication of information and other noncombatant purposes enumerated in this Act.

Public Law 256, 79th Cong., 1st Sess., December 12, 1945, provides:

* * * That subsection (a) of section 321 of title III, part II, of the Transportation Act of 1940, be, and the same is hereby, amended by striking out the following: "ex-

cept that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or property of such members) when such members are traveling on official duty;" so that said subsection, as so amended, shall read as follows:

"SEC. 321. (a) Notwithstanding any other provision of law, but subject to the provisions of section 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, and the rate determined by the Interstate Commerce Commission as reasonable therefor shall be paid for the transportation by railroad of the United States mail: *Provided, however,* That any carrier by railroad and the United States may enter into contracts for the transportation of the United States mail for less than such rate: *Provided further,* That section 3709, Revised Statutes (U. S. C., 1934 edition, title 41, sec. 5), shall not hereafter be construed as requiring advertising for bids in connection with the procurement of transportation services when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed."

SEC. 2. The amendment made by section 1 of this Act shall take effect October 1, 1946: *Provided, however,* That any travel or transportation specifically contracted for prior to such effective date shall be paid

for at the rate, fare or charge in effect at the time of entering into such contract of carriage or shipment.

SEC. 3. The Interstate Commerce Commission, in the exercise of its power to prescribe just and reasonable rates, fares, and charges, shall give due consideration to the increased revenues which carriers will receive as a result of the enactment of this Act, so that such increased revenues will be reflected in appropriate readjustments in rates, fares, and charges to shippers.

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Nos. 56 and 57

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES, PETITIONER

v.

LEIGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY

UNITED STATES, PETITIONER

v.

ATLANTIC COAST LINE RAILROAD COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 56

UNITED STATES, PETITIONER

v.

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY

No. 57

UNITED STATES, PETITIONER

v.

ATLANTIC COAST LINE RAILROAD COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

In No. 56, the opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 30–33) is reported in 152 F. 2d 228; the

opinion of the District Court of the United States for the Eastern District of Virginia, Norfolk Division (R. 18–28) is reported in 60 F. Supp. 433. In No. 57, the opinion of the Circuit Court of Appeals (R. 20–21) is reported in 152 F. 2d 230; the opinion of the District Court of the United States for the Eastern District of Virginia, Richmond Division (R. 14–18), is unreported.[1]

JURISDICTION

In both cases, the judgments of the Circuit Court of Appeals were entered on December 13, 1945 (No. 56, R. 33; No. 57, R. 21). The petitions for writs of certiorari were filed on March 12, 1946, and were granted on April 29, 1946 (No. 56, R. 35; No. 57, R. 23). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether phosphates (in No. 56) and phosphate rock (in No. 56 and No. 57), "defense articles" within the definition of the Lend-Lease Act, owned by the United States and moving in August and September of 1941 on Government bills of lading on consignment to the British

[1] These cases, Nos. 56 and 57, although not formally consolidated, were argued together in the court below (No. 57, R. 21). Since they present identical questions, they are being briefed together in this Court.

Ministry of War Transport under the Lend-Lease Act for use as farm fertilizer in Great Britain, were "military or naval property of the United States moving for military or naval and not for civil use" within the meaning of Section 321 (a) of the Transportation Act of 1940, and hence entitled to move at land-grant rather than commercial freight rates.

STATUTES INVOLVED

The relevant portions of the Transportation Act of 1940, 54 Stat. 898, 49 U. S. C., Sec. 65 (a), and of the Lend-Lease Act, 55 Stat. 31, 22 U. S. C., Supp. V, Secs. 411–419, are set forth in the Appendix, pp. 109–116.

STATEMENT

The facts of both cases are similar. In each case, these facts were stipulated by the parties or admitted by the pleadings, and found by the courts below to be as stipulated and admitted.

No. 56

During August 1941, 78 cars of phosphate rock and superphosphate were shipped on Government bills of lading over respondents' railroad. These carloads had been purchased by the United States, were its property, and were consigned to the British Ministry of War Transport, a duly authorized representative in the United States of His Majesty's Government in the United King-

dom (R. 6–8; 19). They were being exported to Great Britain under the Lend-Lease Act for use, in the form of farm fertilizer, as part of Britain's revised wartime program for intensified production of food (R. 5, 8, 15).

It is agreed that all these phosphate shipments were intended for export under the lend-lease program and were "defense articles" as defined in Section 2 of the Lend-Lease Act; that when requisition was made by any country, the defense of which the President of the United States deemed vital to the defense of the United States, such requisition was considered and scrutinized; that it was accepted or rejected in accordance with the determination by the President or his representative, such as the Lend-Lease Administrator or the Foreign Economic Administration, as to whether or not shipment of the requisitioned materials would promote the defense of the United States in accordance with the provisions of the Lend-Lease Act; that "In 1941, at the times the requisitions for the materials involved in the counterclaim were made, approved and authorized, and the shipments moved, there was a serious food situation in Great Britain, by virtue of the fact that Great Britain, normally a heavy food importing nation, was cut off from many sources of supply"; that it was necessary for Great Britain to intensify production of food and for this purpose to use phosphate fertilizers; that

"the shipments of phosphate rock and superphosphate comprised a part of that program"; that "Great Britain instituted controls which resulted in the proper use and distribution of said materials to accomplish this purpose, for which they were requisitioned and authorized under the Lend-Lease Act"; and that in 1941, the United States was the only practical source from which Great Britain could acquire such materials (R. 15).

In September 1941, respondents billed the United States for the transportation charges on these shipments at the "commercial rate", and the United States paid the bills as rendered (R. 7). Thereafter, in August 1942, the General Accounting Office took formal exception to these payments, on the ground that the shipments were of military property and subject to land-grant rate deductions, and notified the Seaboard Air Line Railway Company accordingly (R. 7–8, 11). The difference between the "commercial rate", which the United States had paid, and the "land-grant" rate to which it was believed to be entitled on these shipments, amounted to $637.54 (R. 7–8). As provided in Section 322 of the Transportation Act of 1940 (Appendix, pp. 110–111), the Government recouped this difference by deducting, in September 1942, the sum of $637.54 from the amount of $733.79 currently owing to the Sea-

board by the Government for certain unrelated freight shipments of wood pulp, and paid respondents the balance of $96.25 (R. 6, 19). Respondents accepted that amount under protest and as part payment only (R. 6), and instituted this action under the Tucker Act in the District Court of the United States for the Eastern District of Virginia to recover the $637.54 withheld (R. 1–2). The United States admitted that respondents were entitled to the sum of $733.79 for the transportation of the wood pulp, but filed a counterclaim for $637.54, to recover the asserted overpayment on the shipments of phosphate rock and superphosphate, and asked that this amount be set off against the respondents' claim, and that the complaint be dismissed (R. 4–5). Respondents' reply denied the alleged overpayment (R. 5–6).

The controversy thus turns solely upon the applicability of land-grant rate reductions, under the Transportation Act of 1940, to the phosphate shipments involved. The parties have stipulated (R. 8) that if the phosphates "were at the time of their transportation by the Seaboard 'military or naval property of the United States moving for military or naval and not for civil use', within the meaning of Section 321 (a) of the Transportation Act of 1940, 54 Stat. 898, 954, the counterclaim asserted by the United States is valid and should be allowed in the amount stated. Other-

wise judgment should be rendered in accordance with the prayer of the petition herein."[2]

The District Court held that the respondent was entitled to the full commercial rates, and accordingly entered judgment for respondents for $637.54, and dismissed the Government's counterclaim (R. 28–29). On appeal to the Circuit Court of Appeals for the Fourth Circuit, the judgment of the District Court was affirmed (R. 33).

No. 57

In August and September 1941, a number of cars of phosphate rock, which had been purchased by the United States, moved on Government bills of lading over the respondent's railroad from Agricola, Pierce, and Brewster, Florida, to Tampa, Florida, also consigned to the British Ministry of War Transport (R. 15–16). These shipments were for export to Great Britain, under the Lend-Lease Act, to be used there as farm fertilizer. The parties made the same stipulations as those in No. 56 concerning the character of the phosphate rock as "defense articles" under the Lend-Lease Act, the procedure for fulfilling requisitions under that Act, and Great Britain's need for and use of phos-

[2] The Seaboard duly filed with the Secretary of the Interior the release of public land claims provided for in Section 321 (b) of the Transportation Act of 1940 (R. 8), and the provisions of Section 321 (a) are therefore fully applicable to its operations.

phate rock in 1941 in order to increase the production of food (R. 17–18).

Respondent billed petitioner for, and petitioner paid, the transportation charges on these shipments at the "commercial rates" (R. 16). Thereafter, in auditing these bills, the General Accounting Office excepted to these payments on the ground that land-grant rates were applicable, and determined that $4,192.33 had been overpaid (R. 16). This sum was deducted by the United States from subsequent bills admittedly due the respondent (R. 1, 15), and respondent instituted this action in the District Court for the Eastern District of Virginia to recover the amounts so withheld (R. 1). As in No. 56, the United States filed a counterclaim for the same sum, and prayed for a set-off and dismissal of the railroad's claim (R. 7–9).

Respondent is not a land-grant railroad and is under no statutory compulsion to accord the Government any reduction in rates, but it has entered into an equalization agreement, dated April 14, 1938, with the United States, under which it has agreed to accept land-grant rates for shipments which the Government could alternatively move over a land-grant road (R. 17). Agricola, Pierce, and Brewster, Florida (the points from which the phosphate rock moved), are stations on both the respondent's line and on the Seaboard Air Line Railway, which is a land-grant railroad (R. 17). Accordingly, it is agreed that the

United States is entitled to secure land-grant deductions from Atlantic Coast Line, the respondent in No. 57, if the Seaboard would have been subject to land-grant rates for carrying similar shipments.[3]

The District Court found that "the facts stipulated are not in any material respect different from the facts" in No. 56 (R. 18), and "under the stipulated facts and on authority of that case", ruled that the freight rates applicable to the shipments are the full commercial rates (R. 18). Judgment was entered in favor of respondent for $4,192.33, and the Government's counterclaim was dismissed (R. 19.) On appeal, the Circuit Court of Appeals for the Fourth Circuit held that "the facts in this case and the question arising on these facts differ in no essential respects from the facts and the question involved" in No. 56, and affirmed the judgment of the District Court "for the reasons set out in our opinion" in that case (R. 21).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Fourth Circuit erred:

1. In holding that the United States was not entitled to land-grant rates on the shipment of

[3] In No. 57, as in No. 56, it is expressly stipulated that the Seaboard has properly filed its release of land claims under Section 321 (b) of the Transportation Act of 1940 (R. 17). See footnote 2, *supra*, p. 7.

phosphates and phosphate rock under the Lend-Lease Act for use in Great Britain.

2. In holding that such phosphates, belonging to the United States and exported to Great Britain pursuant to the Lend-Lease Act for use as farm fertilizer in Great Britain, were not "military or naval property of the United States" within the meaning of Section 321 (a) of the Transportation Act of 1940.

3. In holding that such phosphates, belonging to the United States and shipped on consignment to the British Ministry of War Transport, pursuant to the Lend-Lease Act, for export to Great Britain for use there as farm fertilizer, were not "moving for military or naval and not for civil use," within the meaning of Section 321 (a) of the Transportation Act of 1940.

4. In holding that not all "defense articles," within the meaning of the Lend-Lease Act, exported pursuant to the Lend-Lease Act, are "military or naval property of the United States," within the meaning of Section 321 (a) of the Transportation Act of 1940.

5. In holding that not all "defense articles," within the meaning of the Lend-Lease Act, exported under that Act, are "moving for military or naval and not for civil use," within the meaning of Section 321 (a) of the Transportation Act of 1940.

6. In affirming the judgments of the district court which had entered judgments for respondents and dismissed petitioner's counter-claims.

SUMMARY OF ARGUMENT

Section 321 (a) of the Transportation Act of 1940 provides that "military or naval property of the United States moving for military or naval and not for civil use" is entitled to reduced land-grant rates. The application of this provision to shipments under the Lend-Lease Act must be determined against the background of the history of the times and the purposes the Congress sought to attain in enacting these statutes. So read, it seems clear that property moving under the Lend-Lease Act, the primary purpose of which was to secure the military defense of the United States, falls within the area reserved by Congress in 1940 for reduced railroad rates.

1. The Lend-Lease Act was a military measure designed solely to strengthen the national defense. Its purpose was to protect and defend the United States by making available to the nations fighting the Axis powers an arsenal of supplies to be used for fortifying the military power of those nations, and sustaining them as our first line of defense. Lend-lease shipments consisted of defense articles shipped in the interests of our national defense to maintain the military security of a country the defense of which the President

deemed vital to the defense of the United States. These executive determinations conclusively prove the moving purpose of lend-lease shipments to be purely military. The legislative history and the administration of the Act also emphasize the military character of the Act. Military considerations determined each transfer, and lend-lease and reverse lend-lease together constituted the dominant system of combined war supply.

Respondents and the lower courts rely upon references, in various reports on lend-lease operations, which categorize some of the defense materials as "civilian supplies," "military items," or "non-military goods," to prove that many lend-lease shipments moved for "civil" purposes. But these reports used such terms elastically and for statistical reasons only. For instance, the content of the different categories changes with the varying demands of bookkeeping convenience; the characterization of "military" is generally restricted to arms, munitions, and weapons of war or other "military type" property; certain property which would be admittedly entitled to land-grant rates is listed as "non-military," "agricultural," or "industrial." Moreover, supplies destined for direct civilian consumption in liberated areas were shipped because they contributed to the effectiveness and safety of the military operations of our own and allied armed forces. In short, the nomenclature adopted for the purposes

of some statistical sections of the lend-lease reports is without significance here. On the contrary, the substance of the reports shows that lend-lease shipments moved for military or naval and not for civilian ends.

2. The Court should not independently determine the military necessity for each lend-lease transfer, but should accept the executive findings under the Lend-Lease Act as conclusive of the military purpose of the shipment. However, if such an inquiry is to be made in each case, it is clear that the phosphates involved here were military property moving for military use. It is more than just a slogan that food is a weapon of war. The importance of adequate food to the military survival of a beleaguered nation cannot now be questioned, and phosphates are everywhere recognized as a signficant factor in increasing food production. In 1941, submarine warfare and the occupation of Europe had enormously reduced Great Britain's vital imports of food, and were threatening to starve her into complete defeat. Lend-lease food tided Britain over at the time of her most serious crisis of the war, and lend-lease phosphates had a significant part in raising her domestic food production from some 40% in peacetime to about 70% of her needs in 1943. This increased supply fed Britain's armed forces, her civilians who were totally mobilized for war, and, later, in some degree, our own armed forces

through reverse lend-lease. Above all, the production of added food stocks enabled Great Britain to continue to wage effective war against the Axis powers, and measurably contributed to the final victory.

3. In enacting Section 321 (a) in 1940, Congress aimed to retain land-grant rates in the interests of national defense, but to relieve the railroads of their obligation to carry property moving for relief, public works, or other nondefense governmental purposes. The quantity of these nondefense shipments had greatly mounted during the prior decade, and the railroads were demanding some increase for their then shrunken revenues. The legislative history of Section 321 (a), considered in the light of Congress' intense concern in 1940 with our military defense, indicates that Congress desired to go no further than to conform the present-day land-grant rate rules to the original nineteenth century situation when most of the Government property carried over the railroads was national defense material. Congress had no intention of hampering or increasing the cost of our growing defense preparations, or of discriminating against a large portion of the supplies essential to the national defense effort. The history of the successive but futile efforts, from 1942 to 1946, to abolish land-grant rates, prior to the termination of hostilities, confirms this view.

4. The only interpretation which will harmonize this Congressional purpose with the terms of the land-grant proviso of Section 321 (a) is to apply the reduced rates to all Government property moving to advance the national defense or to promote the prosecution of the war. The test is the pragmatic one of the use to which the property is to be put. Military or naval character is determined not by the type of property but by the use for which it is moving. Property being transported for war or defense purposes is therefore military or naval property; the words "military" and "naval," not being words of art, are certainly elastic enough to bear this interpretation. Under this reading, the cautionary words "and not for civil use" underscore the fact that, to entitle the Government to reduced rates, the war or national defense purpose of the shipments must be real and substantial, and not illusory or far-fetched.

Narrower interpretations of Section 321 (a) are open to serious objections. Land-grant rate history, as well as the legislative history of the Transportation Act of 1940, shows that Congress did not limit the applicability of reduced rates to the limited category of "arms," "munitions," or "implements of war." It is highly improbable that Congress could have intended the War and Navy Departments alone to secure the bene-

fits of these lower tariffs. A third narrow interpretation, restricting land-grant rates to property destined for ultimate use by or under the control of armed forces, wholly disregards the integrated character of modern war, and runs counter to continued Congressional recognition both of the importance of civilian agencies in, and the breadth of materials needed for, our military defense. Finally, any doubt as to the correct reading of the statute should be resolved by application of the rule that grants of public rights and relinquishments of public interests are to be construed liberally in favor of the Government and strictly against the donee.

ARGUMENT

The decision of these cases—as well as the companion case, *Northern Pac. Ry. Co.* v. *United States,* No. 400—depends upon the meaning of the few words in Section 321 (a) of the Transportation Act of 1940 which provide that "military or naval property of the United States moving for military or naval and not for civil use" shall continue to be transported at the comparatively low land-grant rail rates. This provision became law on September 18, 1940. Six months later, on March 11, 1941, President Roosevelt signed the Lend-Lease Act, and shipments to beleaguered Britain and the other nations fighting Germany began to flow over American railways.

These supplies, destined for countries the defense of which the President had deemed "vital" to the defense of the United States, ranged from peanuts to blockbusters. All were being sent for a single purpose: to bolster the military security of the country to which they were assigned.

Were these lend-lease shipments "military or naval property * * * moving for military or naval and not for civil use"? The court below held that the lend-lease supplies here involved—fertilizer to be used on farms in England for producing food—did not come within the statute because they could not be considered "military or naval" property within the "generally accepted meaning" of these terms (No. 56, R. 32). As construed by the court below, Section 321 (a) of the Transportation Act of 1940 requires that, regardless of difficulties of application, a line must be drawn between two types of lend-lease shipments, depending upon whether they are "military or naval" or "civil" in character. Since farm fertilizer would not normally be placed in the same category as guns and planes and bombs, and since the shipments here were not intended for "military" use by the conventional armed forces, the court below treated them as "civil" goods not entitled to move at land-grant rates.

The Government believes that the interpretation placed on the Transportation Act of 1940 by the court below is unduly restrictive, and that all

available aids to construction support the conclusion that defense supplies shipped under the Lend-Lease Act, whatever character and purpose they might possess in a normal peace-time economy, were in a very real sense moving for a military use. The Lend-Lease Act was a military measure designed to protect and defend the United States by making available to friendly nations an arsenal of supplies to be used for fortifying the military power of such nations and sustaining them as our first line of defense. Accordingly, all goods shipped under the Lend-Lease Act should be regarded as "military" property for purposes of the Transportation Act of 1940. This conclusion seems to us not only to be correct as a matter of statutory construction; it also obviates the overwhelming practical difficulties of application which would result if respondents' interpretation were adopted.

The duty of construction which rests upon the Court in these cases is not easy. The language of the Transportation Act of 1940—where the process of construction must begin—provides only an inconclusive answer. There are few legal terms which are less precise in their application and scope than "military", "naval", and "civil". If we look only to the statutory language, neither party could confidently argue for its interpretation of the provision. Nor does the legislative history in the usual sense, i. e., as embodied in

the committee reports and hearings and in the debates, contain any conclusive evidence as to the legislative will. Resort must be had to more subtle and elusive aids to construction; and in our judgment the most persuasive evidence as to the meaning and inter-relationship of these statutes is to be found in the history of the times in which they were enacted.[4] Congress has not provided artistic language; but from the history and background of the enactments here involved one can clearly discern a legislative attitude and approach which can reliably be used as the touchstone of judicial construction.

We recognize that such an historical inquiry is not merely treacherous; it is also likely to be tiresome. To recapture the legislative environment from which emerged these historic measures—the Transportation Act of 1940 and the Lend-Lease Act of 1941—calls for a recital of detail which requires this brief to be of some length. It is hoped, however, that this examination of the background and development of these laws may aid the Court in reaching its decision.

[4] Referring to another statute, Mr. Justice Murphy's opinion for the Court in *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 273, made a general observation which is pertinent here: "The Act was the product of a period, and 'courts, in construing a statute, may with propriety recur to the history of the times when it was passed.' *United States* v. *Union Pacific R. Co.*, 91 U. S. 72, 79."

I

THE LEND-LEASE ACT WAS ENACTED AND ADMINISTERED AS A MILITARY MEASURE, AND "DEFENSE ARTICLES" SHIPPED UNDER THE ACT WERE MILITARY PROPERTY MOVING FOR A MILITARY USE

A. THE PRIMARY PURPOSE OF THE LEND-LEASE ACT WAS TO SECURE THE MILITARY DEFENSE OF THE UNITED STATES

That the Lend-Lease Act was a military measure designed to strengthen the national defense is evidenced by its text, the course of its evolution and enactment in Congress, and the considerations which governed its administration.

1. *The text of the statute.*—The Lend-Lease Act is entitled "An Act to Promote the Defense of the United States." Section 3 (a) provides that "the President may, from time to time, when he deems it in the interest of national defense, authorize the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government * * * To sell, transfer title to, exchange, lease, lend, or otherwise dispose of" "any defense article" to "the government of any country whose defense the President deems vital to the defense of the United States." "Defense article" is defined in Section 2 (a) as including "Any agricultural, industrial or other commodity or article for defense", in addition to weapons, munitions, aircraft, vessels and boats, means of making and repairing them, and component parts

thereof. The parties have agreed, and the court below has found, that during the period of active lend-lease shipments, when requisition was made by any country the defense of which the President deemed vital to the defense of the United States, such requisition was carefully considered and scrutinized; it was then accepted, modified or rejected in accordance with the determination by the President, or his duly authorized representative (such as the Lend-Lease or the Foreign Economic Administrator) as to whether or not shipment of the requisitioned materials would promote the defense of the United States in accordance with the provisions of the Lend-Lease Act. (No. 56, R. 15; No. 57, R. 17). Accordingly, lend-lease shipments such as the phosphates involved here always consisted of articles useful for defense, in the process of transfer to a country the defense of which the President had found to be vital to our national defense, and pursuant to a finding by the executive branch of the Government that the defense of the United States would be promoted by the shipment. These executive determinations are conclusive, and neither respondents nor the lower courts have asserted otherwise. Cf. *United States* v. *Bush & Co.*, 310 U. S. 371, 380; *United States* v. *Curtiss Wright Export Corp.*, 299 U. S. 304, 314; *Hirabayashi* v. *United States*, 320 U. S. 81, 93.

2. *Legislative history.*—The history of the Act further demonstrates the truth of the assertion,

to which the Circuit Court of Appeals gave its "cheerful assent", that "the Lend-Lease Act was enacted as a defense measure, not as a program of humanitarian charity." (No. 56, R. 31).[5] This was the keynote of President Roosevelt in the first public notice of the proposal, on December 17, 1940, when he said that "the best immediate defense of the United States is the success of Great Britain defending itself; and that, therefore, quite aside from our historic and current interest in the survival of democracy in the world as a whole, it is equally important from a selfish point of view and of American defense, that we should do everything possible to help the British Empire to defend itself."[6] In his state-of-the-union message of January 6, 1941, President Roosevelt called for legislative authorization to "act as an arsenal" for the nations engaged in actual war with aggressor nations.[7] In response to this request, the Lend-Lease Bill, H. R. 1776, was introduced on January 10, 1941. At the hearings before the Committee on Foreign Affairs of the House of Representatives, the Secretaries of State, War, Navy, and the Treasury, and the Director General of the Office of

[5] A detailed account of the genesis of the Lend-Lease Bill and of the debates, public and Congressional, is contained in Stettinius, *Lend-Lease, Weapon for Victory*, Chaps. VI and VII.

[6] Stettinius, *Lend-Lease, Weapon for Victory* (1944), pp. 65–66.

[7] H. Doc. No. 1, 77th Cong., 1st Sess., p. 4.

Production Management appeared publicly to support the bill as a military measure essential to the national defense. (See Hearings before the House Committee on Foreign Affairs, 77th Cong., 1st Sess. on H. R. 1776). Secretary of State Cordell Hull outlined the ever-growing course of aggression by Germany and Japan which made it "increasingly apparent that mankind is today face to face, not with regional wars or isolated conflicts, but with an organized, ruthless, and implacable movement of steadily expanding conquest. * * * [We] must not be diverted * * * from our firm determination to create means and conditions of self-defense wherever and in whatever form we find essential to our own security. * * * [The proposed bill] sets up machinery which will enable us to make the most effective use of our resources for our own needs and for the needs of those whom, in our own self-defense, we are determined thus to aid." (Hearings, pp. 5, 7.)[8] Secretary of

[8] Secretary Hull also expressed his firm conviction that "the most practical course in prosecuting as speedily and effectively as possible steps in our national defense is not merely to arm here at home and wait for the invader to cross our border, but * * * to resist by aiding those who are now right in line between us and the invader and resisting to the utmost" (Hearings, pp. 13, 16). "As I said many times here this morning, the attitude of this Government is one of defending itself primarily by aiding another country already attacked to defend itself" (p. 26). "Let us get back to the purpose of the bill which is to aid in the defense of the United States by rendering

War Henry L. Stimson testified that the bill was "based upon the proposition that the effective defense of this country in the pending emergency depends in large part upon our giving effective help to Great Britain and perhaps to other nations defending themselves against the Axis Powers" (p. 85), and that "the proposed bill is a forthright and clear grant of power which will enable the President to place in operation the best and simplest plan to carry out a national policy many times stated and endorsed. It substantially assists us in the job of caring for our own needs and the needs of those whose defense is a matter of vital importance to us" (p. 90). Secretary of the Navy Frank Knox repeatedly stressed the importance to our own naval defense of the survival of Great Britain and its fleet (pp. 156–158; 181–184): "we will act in our best national interests, therefore, if, while increasing our naval power as fast as we can, we provide the British Commonwealth with the means that will bring her through this tragic crisis" (p. 158). Similarly, the record of the Senate hearings is replete with avowals of the necessity of lend-lease for the defense of the United States. (See Hear-

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certain *military* aid to Great Britain" (p. 33, italics added). "The matter we have been discussing all day here is a matter of promoting our defense, frankly by furnishing *military* supplies to a country that is resisting the same attack that is moving our way, or at least that is creating imminent danger to the hemisphere and hence to us" (pp. 38–39, italics added).

ings before the Senate Committee on Foreign Relations, 77th Cong., 1st Sess., on S. 275, pp. 3 *et seq.*, 87–90, 122, 177–179, 180–182.)

One cannot go through the committee reports and the Congressional debates without sensing again the urgency and gravity of the military situation portrayed by our responsible leaders in both the legislative and executive branches of the Government, and the extent to which they regarded lend-lease as desperately essential to the common defense. The Committee on Foreign Affairs of the House stated that the bill was designed "for our own national security, to aid Britain and those other nations whose defense is vital to the defense of the United States," and that its prompt enactment was "of the highest importance to the vital interests of our country—and even of our civilization."[9] The Senate Committee on Foreign Affairs concluded: "To the end that we may have peace the bill authorizes aid to be given promptly to those nations whose defense is vital to ours. To the end that we may have freedom, the bill casts the strength of American industry into the struggle against forces which may be directed against us."[10]

3. *Administration of the statute.*—Until the Office of Lend-Lease Administration (later merged into the Foreign Economic Administra-

[9] H. Rep. No. 18, 77th Cong., 1st Sess., pp. 2, 11.
[10] S. Rep. No. 45, 77th Cong., 1st Sess., p. 2.

tion) was established on October 28, 1941 (Exec. Order No. 8926, 6 F. R. 5519), the President was assisted in the administration of the Act by the Division of Defense Aid Reports (Exec. Order No. 8751, 6 F. R. 2301), the functions of which were characterized as "essentially of a military character", and an Army officer was assigned by Presidential Military Order as its Executive Officer. Military Order of May 6, 1941, 3 CFR, Cum. Supp., pp. 1306–1307; 6 F. R. 2301. Consistently with this initial conception, the administration of the Act never strayed from its fundamentally military objectives. From March 11, 1941, to December 7, 1941, the aim was to secure the national defense of the United States; and, after December 7, 1941, the successful prosecution of the war, together with our allies, in both the West and the East.[11]

The First Report under the Lend-Lease Act, June 10, 1941 (S. Doc. No. 66, 77th Cong., 1st Sess.), commences by stating that the main object of the Act is "to promote the defense of the

[11] Congress quickly attested to the vital importance of lend-lease exports by extending the President's priority power to lend-lease contracts and orders. Act of May 31, 1941, 55 Stat. 236. These orders were bracketed in essentially with Army and Navy contracts. See 87 Cong. Rec. 3800, 3803, 4150. In the debates on the property requisitioning bill, Act of October 16, 1941, 55 Stat. 742, it was pointed out that lend-lease materials would be subject to requisitioning "because the Lend-Lease Act is part of our national defense." 87 Cong. Rec. 6786.

United States by supplying material aid to those nations whose defense is vital to our defense" (p. 1). In his letter of September 11, 1941, transmitting the Second Report (S. Doc. No. 112, 77th Cong., 1st Sess.), President Roosevelt said: "We are not furnishing this aid as an act of charity or sympathy, but as a means of defending America", and "The lend-lease program is no mere side issue to our program of arming for defense. It is an integral part, a keystone, in our great national effort to preserve our national security for generations to come, by crushing the disturbers of our peace" (p. vi). In describing the screening procedure for Lend-Lease requests, the report says: "All items not essential to the successful prosecution of the war effort are eliminated. The governments receiving lend-lease aid have been scrupulous to limit their requests to vital needs" (p. 4).[12] The same themes run throughout each of the twenty-two reports which have been issued.[13]

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[12] The British Government's memorandum of September 10, 1941, transmitted to our Ambassador, categorically stated that "All materials which we obtain under the Lend-Lease Act are required for the prosecution of the war effort." See Appendix I to Second Report, p. 29.

[13] See, for instance, Third Report, December 12, 1941 (S. Doc. No. 149, 77th Cong., 1st Sess.), pp. 29–30; Fourth Report, March 11, 1942 (H. Doc. No. 661, 77th Cong., 2d Sess.), pp. 5, 6, 32; Fifth Report, June 11, 1942 (H. Doc. No. 799, 77th Cong., 2d Sess.), pp. 5, 12; Sixth Report, September 11, 1942 (H. Doc. No. 839, 77th Cong., 2d Sess.), pp. 5, 12, 14; Seventh Report, December 11, 1942 (H. Doc. No. 994, 77th

"*Military considerations* constitute the paramount and determining factor in the provision of all lend-lease aid" (Eighteenth Report, p. 8; Nineteenth Report, p. 40; italics added). "Everything that has been done under the Lend-Lease Act has been for the defense of the United States and for no other purpose" (Sixteenth Report, p. 7). "Lend-Lease and reverse lend-lease are a system of combined war supply" (Seventeenth Report, p. 8).

Far better than any catalog that we could present, the pages of the twenty-two reports to Con-

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Cong., 2d Sess.), pp. 5, 15; Eighth Report, January 25, 1943 (H. Doc. No. 57, 78th Cong., 1st Sess.), pp. 7, 8, 9; Ninth Report (Eighth Quarterly Report), March 11, 1943 (H. Doc. No. 129, 78th Cong., 1st Sess.), pp. 17–18; Tenth Report, May 25, 1943 (H. Doc. No. 209, 78th Cong., 1st Sess.), pp. 6–7; Eleventh Report, August 25, 1943 (H. Doc. No. 263, 78th Cong., 1st Sess.), pp. 6, 7; Twelfth Report, November 11, 1943 (H. Doc. No. 353, 78th Cong., 1st Sess.), p. 1 *et seq.* (reverse lend-lease); Thirteenth Report, January 6, 1944 (H. Doc. No. 375, 78th Cong., 2d Sess.), pp. 5, 7; Fourteenth Report, March 11, 1944 (H. Doc. No. 497, 78th Cong., 2d Sess.), pp. 13–14; Fifteenth Report, May 22, 1944 (H. Doc. No. 616, 78th Cong., 2d Sess.), pp. 5, 6, 10; Sixteenth Report, August 23, 1944 (H. Doc. No. 674, 78th Cong., 2d Sess.), pp. 5–7; Seventeenth Report, November 24, 1944 (H. Doc. No. 764, 78th Cong., 2d Sess.), (reverse lend-lease), p. 7 *et seq.*; Eighteenth Report, February 20, 1945 (H. Doc. No. 98, 79th Cong., 1st Sess.), pp. 7, 8–9; Nineteenth Report, May 22, 1945 (H. Doc. No. 189, 79th Cong., 1st Sess.), pp. 5, 7, 40, 46–47; Twentieth Report, August 30, 1945 (H. Doc. No. 279, 79th Cong., 1st Sess.), pp. 5, 7–9; Twenty-First Report, January 31, 1946 (H. Doc. No. 432, 79th Cong., 2d Sess.), pp. 5, 7, 11; Twenty-Second Report, June 14, 1946 (H. Doc. No. 663, 79th Cong., 2d Sess.), pp. 8–9.

gress underscore, with a wealth of detail and example, these abiding principles of lend-lease supply. By the end of the war, some forty-nine billion dollars in goods and services had been transferred under the Act; actual munitions accounted for 46.9%, petroleum products 5.2%, industrial items (machine tools, iron and steel, etc.) 22.2%, agricultural items (including food) 12.8%, and services and miscellaneous costs, 12.9%; reverse lend-lease brought to our forces over seven billions of goods, facilities and services. Twenty-Second Report, pp. 17–26. As respondents admit (No. 56, R. 15; No. 57, R. 17), no allocation of these many and varied war supplies was made to our allies without careful consideration by American missions in the field, and review by central war agencies, including the War and Navy Departments, Foreign Economic Administration, War Food Administration, War Production Board and the War Shipping Administration, to assure both that our domestic needs had been properly weighed and that the supplies were essential to satisfy genuine war needs.[14] Second Report, p. 7 *et seq.*; Ninth Report, pp. 18–21; Nineteenth Report, p. 40; Stettinius, *Lend-Lease, Weapon for Victory*, pp. 159–163. Those charged

[14] For instance, lend-lease exports to Latin America were confined to munitions and supplies for use by armed forces. Fifteenth Report, p. 30; Eighteenth Report, p. 22; Nineteenth Report, pp. 46–47. All cigarettes exported under lend-lease went to allied armed forces. Eighteenth Report, p. 14.

with responsibility for expending the gigantic lend-lease appropriations (Twenty-Second Report, p. 27) were alert to prevent use of lend-lease supplies for non-war ends. See Nineteenth Report, pp. 40–47.

The essentially military character of lend-lease, as a "system of combined war supply", is further illustrated by reverse lend-lease, or mutual aid. Through that mechanism, war supplies could be produced and delivered by the nation best equipped, at the moment, to do so; and the resources of the United Nations were pooled for placement where they could best be used to wage war. Twelfth Report; Seventeenth Report; Stettinius, *supra,* Chap. XXV. The freight space of hundreds of ships was saved for essential American supplies by the provision of clothing, food, gasoline, and shelter by the United Kingdom to American armed forces; the invasion of the continent was made possible by the synthetic harbors invented and built by the British for unloading supplies on the beaches of France; the *Queen Mary* and the *Queen Elizabeth* transported thousands of American troops to the war theaters. The military importance, in the most stringent sense of that term, of reverse lend-lease is emphasized by President Roosevelt's official statement that "Without the reverse lend-lease aid that we received from the United Kingdom, we would surely have been forced to delay the in-

vasion of France for many months." Letter of November 24, 1944, transmitting the Seventeenth Report. It cannot be forgotten that the lend-lease mechanism directly enabled us to obtain these immense benefits for our armed forces. Not only did lend-lease provide a system of combined war supply, it also served to keep in operation the allied war production machine which supplied our troops. To that end, phosphates as well as airplanes, machine tools as well as tanks, flowed in continuous stream to Great Britain and our other allies.

Since lend-lease and reverse lend-lease were consistently viewed as a system of combined war supply, it was always understood that they should end with the war. Seventeenth Report, p. 8. They did in fact end with the cessation of hostilities, subject to military needs for the movement of troops or for occupation purposes. See President Truman's letter of August 30, 1945, transmitting Twentieth Report, p. 5. "The surrender of Japan signaled the termination of lend-lease as a weapon for victory and prompt steps were taken by this Government to insure a rapid but orderly reduction of lend-lease expenditures and to bring to a close the employment of lend-lease procedures in supplying essential war needs to our allies." President's letter of January 31, 1946, transmitting Twenty-First Report. The military goal had been won, and the implements

which had been essential to the attainment of that victory were no longer needed.

B. LEND-LEASE SHIPMENTS DID NOT MOVE FOR "CIVIL" PURPOSES

Respondents argue that Congress and the administrators of the Act have clearly distinguished between "civilian" and "military" aspects of lend-lease, and that such a distinction is decisive in resolving the land-grant issue raised here. They seek support, on the one side, in the conceded intention of Congress to include within the category of "defense article" the vast armory of articles and commodities of all types and description required for the prosecution of total war, and, on the other, in the frequent appearance in the lend-lease reports of terms such as "military supplies", "non-military items", and "civilian supplies."

1. *Scope of lend-lease supplies.*—As for respondent's first point, we wholly agree, of course, that Section 2 of the Lend-Lease Act was designed to authorize any article or material useful for war purposes to be transferred to our allies. Out of an abundance of legislative caution, Section 2 (a) (4) was expressly amended to insert the words "any agricultural, industrial", into the original phrase, "any other commodity or article for defense", 87 Cong. Rec. 2050-2, 2167. We agree that supplies of all kinds were continuously transferred under the Act, and properly so. But it does not follow that an "agricultural

or industrial commodity for defense" which has become a "defense article", and is to be shipped "in the interest of national defense" to a country "whose defense the President deems vital to the defense of the United States" is therefore moving for a "civil use," within the meaning of the Transportation Act.

The dominant aim of Congress in enacting Section 321 (a) was to continue land-grant rates for Government property moving for military, including national defense, purposes. Property can move for a military use even though the goods in question—like bowling alleys—would not, in ordinary parlance, be lumped with guns, tanks, or other implements of war which more clearly fall within the category of "military" property. Congress did not restrict the coverage of Section 321 (a) to munitions, weapons, and arms. Instead Congress used the broad elastic term "military property"; and there is nothing to indicate that Congress desired to exclude any commodity, be it industrial, agricultural, or munition, from the reduced charge, so long as the movement was for a military or naval purpose. Property moving for such a purpose must be regarded as "military or naval" property. The fact that a certain commodity is ordinarily regarded as "military type" property or "civil type" property cannot be controlling of the issue here. Parachute silk may be used for making ladies' lingerie; and cold cream may be used for treating fliers' burns.

2. *Characterizations contained in the lend-lease reports.*—The excerpts from the lend-lease reports cited by responderts and the court below prove two things:—first, aid and supplies were shipped for use or consumption by civilians where necessary in aid of actual military operations, or to sustain the essential productive system of an ally fighting for its life, or for the subsistence of American and allied armed forces overseas; and secondly, the reports have, for purposes of exposition and statistics, generally distinguished between actual weapons, arms, and munitions—which are given the short-hand label "military" goods—and other supplies to be used or consumed by soldiers or civilians—which are conveniently described as "non-military," "industrial" or "civilian" goods.

(a) Respondents' main error, in reading the lend-lease reports, is their failure to note that the agencies administering lend-lease have been entirely flexible in using terms such as "military items," "military goods," "non-military items," or "industrial materials and products," in the senses most convenient for their own current accounting and statistical purposes, and without any intention of affecting the application of the Transportation Act of 1940 or any other statute. As we shall have occasion to point out later (pp. 79–82), the words "military" and "non-military" have widely variable content, and their meaning in one context has no definitive bearing

upon a use for another purpose and in a different context, sometimes even within the same document. The lend-lease reports themselves contain abundant examples of this fact, and often quite properly use the adjective "military" in several senses in one report.

As for characterization of supplies, the earlier reports generally apply "military" only to the limited field of munitions, weapons, arms, and implements of war, but even the content of this category is fluid. For instance, the Fourth Report (p. 19) (cited by the Circuit Court of Appeals, No. 56, R. 32) lists the following under the heading "military": "Airplanes, airplane parts, tanks, ordnance, ammunition, field communications equipment, trucks, and petroleum * * * small ships, naval aircraft and ordnance * * * many varieties of ship and airplane stores and equipment." The Seventh Report (p. 8) lists "petroleum products" as an "industrial item", and "military items" include items such as "planes, tanks, ships, guns and ammunition"; at page 16, "military items" include "ordnance, ammunition, aircraft, tanks, motor vehicles, and spare parts, but do not include merchant and naval vessels." In the Eighth Report (p. 21), "military items" cover "aircraft of all types, together with spare engines, propellers, and other parts; tanks, tank destroyers, trucks, jeeps; auxiliary naval vessels and naval equipment; supply ships; ordnance stores such as

ammunition and trucks of all types, small arms, anti-aircraft and anti-tank guns, naval guns and other artillery, mines and torpedoes, etc.; medical, signal, chemical warfare and miscellaneous equipment."[15] The Eleventh Report (p. 8 and chart 3, p. 13) clearly equates "military articles" with "munitions," and the later reports usually employ the term "munitions" as the first of the large categories referred to by the Circuit Court of Appeals[16] (No. 56, R. 32). To equate "military items" with "munitions" is entirely permissible for purposes of lend-lease statistics, but it is wholly inadequate as a basis for determining the scope of Section 321 (a) of the Transportation Act. See *infra,* pp. 88–91.

Moreover, the so-called "non-military" classes of the reports unquestionably include supplies which the lower courts, and probably even the respondents, would regard as "military or naval property moving for military or naval and not for civil use." Under "Industrial Materials and Products", the Eighteenth Report (p. 12) covers

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[15] All these reports list "naval" arms and munitions under the heading of "military items", but we are certain that respondents would not hold "military property" as used in Section 321 (a), to include these naval supplies, thus leaving "naval property" superfluous.

[16] See Thirteenth Report, chart 4 (p. 14), table 12 (p. 56); Fourteenth Report, chart 2 (p. 9), tables 15 and 18 (pp. 54, 57); Fifteenth Report, pp. 8–9, 44–45, 49; Sixteenth Report, pp. 10–11; Eighteenth Report, pp. 8, 10, 40, 45; Nineteenth Report, pp. 8–9, Chap. 3; Twentieth Report, pp. 10, 11; Twenty-First Report, pp. 11, 37.

signal, quartermaster, chemical warfare, engineer, and medical equipment and supplies, as well as equipment, materials and supplies for naval and military bases; the same classification is made by the Nineteenth (pp. 8–9, 25), the Twentieth (p. 10), and the Twenty-First (p. 11) Reports. Petroleum products (including those directly intended for American and allied planes, tanks, and war vehicles) are sometimes included under "nonmilitary goods" (Third Report, p. 11; Fourth Report, p. 14), sometimes under "industrial materials" or "industrial materials and products." (Sixth Report, p. 7; Seventh Report, p. 8; Eighth Report, pp. 22, 30; Tenth Report, p. 12; and Eleventh through Eighteenth Reports; see especially Thirteenth Report, Chap. 7, "Lend-Lease Petroleum in the War" and Eighteenth Report, p. 10), and sometimes under an individual heading (Nineteenth Report, pp. 8, 9, 54; Twentieth Report, p. 10; Twenty-First Report, p. 11; Twenty-Second Report, p. 24). Food and tobacco for British, Soviet, and Chinese soldiers are consistently included under "agricultural commodities" or "nonmilitary goods" rather than "military items" or "munitions." Substances used to extinguish incendiary bombs, chemicals for the manufacture of shells, wood for propellers, medical supplies for soldiers, textiles and leather for soldiers' uniforms—all are termed "industrial" rather than "military". Fourth Report, p. 21. Alloys, tools, and metals directly essential to the production of arms and ammunition are likewise

placed in the "industrial category." See Eighteenth Report, pp. 12–13.

Obviously, therefore, the classifications made by the lend-lease reports are variable and rough labels designed simply to facilitate understanding, by the public and the lend-lease authorities themselves, of the quantities and types of lend-lease shipments. These characterizations were drawn, without undue refinement, from that given by the procuring agency,[17] or the appropriation charged for the supply,[18] or from some conven-

[17] We are informed, for instance, that in the early reports all goods procured by agencies other than the War and Navy Departments, including such combat-useful items as gasoline, were lumped together as "nonmilitary."

[18] The six specific lend-lease appropriation acts (Defense Aid Supplemental Appropriation Act, 1941, 55 Stat. 53; Defense Aid Supplemental Appropriation Act, 1942, 55 Stat. 745; Second Defense Aid Supplemental Appropriation Act, 1942, 56 Stat. 130; Defense Aid Supplemental Appropriation Act, 1943, 57 Stat. 151; Defense Aid Appropriation Act, 1945, 58 Stat. 628; Defense Aid Appropriation Act, 1946, c. 271, 59 Stat. 412, approved July 5, 1945) made appropriations under the following general headings.

Ordnance and ordnance stores
Aircraft and aeronautical material
Tanks, armored cars, etc.
Vessels, ships boats, and other watercraft
Miscellaneous military equipment, supplies, and material
Facilities and equipment
Agriculture, industrial, and other commodities
Testing, reconditioning, etc. of defense articles
Services and expenses
Administrative expenses

The military, naval, and Maritime Commission appropriations acts authorized the respective agencies to use their

tional "inherent character". It was hardly contemplated by the authors of these reports that the construction of any statute or rule of law would depend upon the label that happened to be given, at a particular moment, to a certain item. Respondents draw legal conclusions wholly unwarranted from the very natural segregation of civilian *type* articles from military *type* articles. On this classification of a peacetime usage they seek to engraft a nonexistent military determination. For the pur-

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appropriations for lend-lease procurement, in general terms, without specifying appropriation headings (e. g. Military Appropriation Act, 1943, Sec. 13, 56 Stat. 611, 632); for statistical purposes, the Treasury Department (Bureau of Accounts) maintained all lend-lease accounts under the above ten appropriation headings.

These appropriation headings were broad and semi-arbitrary classes, cutting across procurement agencies and ultimate purposes of the product, and mainly useful for statistical and accounting work. The War Department, for instance, had been allocated, by June 30, 1946, over $400,000,000 under the heading "Agricultural, Industrial and Other Commodities and Articles", and over $750,000,000 under the heading of "Facilities and Equipment for Production"; by June 30, 1946, the Treasury Department had been allocated over $250,000,000 under the heading of "Miscellaneous Military Equipment, Supplies, and Materials", over $150,000,000 under the heading of "Tanks and Other Vehicles", and over $5,000,000 under "Aircraft and Aeronautical Material". As for products procured under the category of "Agricultural, Industrial and Other Commodities", for example, were listed all food products, fire fighting equipment, supplies, and materials, railroad equipment, all petroleum products, iron and steel and other metals, etc. See Treasury Department (Bureau of Accounts), Cumulative Report on Lend-Lease Fiscal Operations, through June 30, 1946.

poses of those keeping lend-lease statistics and writing its reports, it was immaterial what category-names were chosen, or what articles were cast into this class or that, since the Lend-Lease Act applied equally and identically to all "defense articles". To transfer this system of statistical classification, with its entirely unrelated character and purpose, to Section 321 (a) of the Transportation Act, seems to us only to compound confusion.

(b) From the admitted fact that a substantial portion of lend-lease aid was destined for use or ultimate consumption by civilians, respondents infer that these supplies cannot have moved for "military" or "naval" use. But this is to disregard the essentially military character of the lend-lease program. "Military considerations constitute the paramount and determining factor in the provision of all lend-lease aid" (Eighteenth Report, p. 8; Nineteenth Report, p. 40). The constant target was the defeat of the Axis. Each shipment of lend-lease supplies was intended to bring that day closer. The particular means by which each shipment could help in the attainment of final victory was dictated by the fluctuating demands of the war. Foodstuffs, lend-leased for civilian consumption, frustrated the Axis plan of causing the collapse of our allies through starvation, sustained the allied war production system, and made possible the continued production of munitions, arms, and other war supplies. Ninth Report, Chap. 4; Eleventh Report, Chap. 3. Agri-

cultural implements, seeds, and fertilizers enabled some of the United Nations to increase their food production for our troops (including American civilians attached to the military), as well as for their own armed forces and civilians engaged in war production. Fourteenth Report, p. 47; Thirteenth Report, Chap. 8: "Lend-Lease and Farm Machinery". Manufacture of planes and other munitions could not long have continued without machine tools, metals, and essential raw materials. Twenty-First Report, p. 15. Lend-lease merchant ships transported war supplies as well as allied armies.

Supplies for civilians in newly liberated areas were likewise intended to rehabilitate the industrial economy for war production and supply, or to prevent disease or unrest which would interfere with current operations. "From the first, civilian supplies were imported as an integral part of our military program". Stettinius, *Lend-Lease, Weapon for Victory,* pp. 302–303 (detailing the four main military objectives of these supplies). "The United Nations will help the victims of war in liberated territories, not only out of common humanity, but for the most urgent political and military reasons." Seventh Report, p. 25. "Lend-lease is also helping to strengthen the civilian front behind the lines where famine or pestilence might seriously jeopardize our chances of success on the actual fighting lines."

Ninth Report, p. 26. "It is vitally important for the winning of the war that we be prepared to move in rapidly with food in the wake of any military developments that open these areas to the United Nations. Our troops cannot take the offensive successfully in the midst of famine and pestilence, riots and revolution." Eighth Report, p. 46. "In the coming battles for Germany and Japan, we shall need the full support and the full resources of the peoples of the newly liberated areas. This is a military and political necessity of the first order. Their fields can produce food not only for their own people, but for the United Nations' forces. Their factories and mines can supply not only themselves, but our armies as well." President's letter of May 25, 1943, transmitting Tenth Report, p. 5; see also Tenth Report, pp. 16–17. "In addition to arms, we have provided to French Africa vital civilian supplies under lend-lease, at the request of our military commanders. This aid has been essential to United Nations operations in the Mediterranean theater." Thirteenth Report, p. 25. After the capitulation of Germany, lend-lease to our liberated allies was justified by the needs of occupation and of redeployment to the Pacific Theater. "These countries [i. e., France, Belgium, Netherlands] have continued to be important bases of allied military activities in Europe. Their ports and transportation facilities, severely

damaged as the result of enemy action and the bombings and offensives of the liberating allied forces, their production facilities and the services of thousands of their civilians are indispensable for the redeployment of millions of American and other allied forces and their equipment and to the support of our forces of occupation. Lend-lease aid to these countries has helped to increase the effectiveness of their assistance in our military tasks of redeployment and occupation." Twentieth Report, p. 33.

Congress has expressly recognized, in legislation enacted since the Lend-Lease Act, that supplying civilians with subsistence can have prime military significance. Both the Military Appropriation Act, 1945, 58 Stat. 573, 593, and the Military Appropriation Act, 1946, c. 265, 59 Stat. 384, provide that appropriations for the military establishment for the respective fiscal years shall be available "for food, clothing, medicine and other items to meet urgent civilian needs in occupied and such other areas as may be determined by the Secretary of War to be important to military operations of the United States." Cf. Military Appropriation Act, 1947, Public No. 515, 79th Cong., 2d Sess., "Government and Relief in Occupied Areas." For justification of the military need for such supplies, see Hearings before a Subcommittee of the House Committee on Appropriations, 78th Cong., 2d Sess., on the

Military Establishment Appropriation Bill for 1945, pp. 13, 37–38, 154–164 (statements of Lt. General McNarney, Major Generals Richards, Hilldring and Clay).

In short, modern warfare results in what superficially seems a paradox: that "civilian" supplies may be used primarily to fulfill military purposes. And we think it beyond controversy that such was the dominant purpose of the transfer of "civilian supplies" under the Lend-Lease Act to our allies and to the liberated areas.[19]

C. THE PARTICULAR SHIPMENTS HERE INVOLVED WERE MILITARY PROPERTY MOVING FOR MILITARY USE

The Government urges that all lend-lease "defense articles" are entitled to land-grant rates. In our view, examination of the nature and purposes of each shipment is both unnecessary and inappropriate. Unless the authority to make the transfer under the Lend-Lease Act is successfully challenged, there exists in each case a proper executive finding that the shipment will promote

[19] Respondents have not denied that the lend-lease shipments involved here constituted property of the United States. It is perhaps noteworthy that possession and control over lend-lease shipments always remained in the United States, or its agents, until transfer to the possession and control of the receiving country took place at ship-side. Title clearly remained in the United States during the period of its possession and control, and was not considered to pass even after transfer, at the ship, to the allied nation.

our national defense. The courts should not be required to reexamine the need for a specific shipment, or to balance the circumstances in order to weigh the effect of the transfer, or its withholding, upon the course of the war. Nor would such individual rulings aid materially in the administrative decision of the many rates under Section 321 (a) still in controversy between the railroads and the Government.

Nevertheless, since the cases now before the Court do involve phosphates shipped to Great Britain in 1941, we shall refer to the circumstances which clothed these particular shipments with military significance.

Phosphates are vital, in time of war, as fertilizer in the production of food.[20] Hendrickson; *The Food Crisis*, pp. 154–5. The stoppage of phosphates and fodder has been considered by some as a more important factor in the defeat of Germany in World War I than the cutting off of her overseas food supply. See Garner, *Proposed Immunity of Food Ships in Time of War*, (1930) 24 Am. J. Int. Law 566, 568; statement of Congressman Leavy, 83 Cong. Rec. 9342 (1938). This was early recognized in the first world war, and phosphorus and its compounds were desig-

[20] It may be noted that phosphates are also a key ingredient in the production of many types of munitions, including tracer bullets and flares, grenades and bombs. Johnson, *Economic Factors in the U. S. Phosphate Industry* (1944), 25 Mining and Metallurgy 455, at 464.

nated "absolute contraband" by Great Britain on January 27, 1916. Rackham, *List of Contraband,* 3rd ed.

The great importance of food to a people at war, civilians as well as soldiers, has not been seriously questioned for over thirty years. "During the World War the battleship was a factor, but the cutting off of the food supply by vessels of less tonnage was a main objective. There was also a question as to what constituted food, and the list of contraband was enlarged to an extent heretofore unknown, so that almost every commodity might be included. States mobilized their entire populations. It was difficult to determine whether women working in munition factories behind the lines were more essential or the men at the front." Wilson, *Food Supplies and Belligerents,* (1930) 24 Am. J. Int. Law 365; see also Garner, *supra* at p. 567. "Food is a weapon of war. In its way it is as essential to winning the war as planes or guns. Germany's unrestricted submarine campaign in the war of 1914–18 was primarily an attempt to knock out England by cutting off her food supply. And food shortages in Germany and Austria resulting from the successful British blockade played a large part in the Allied victory then." Eighth Lend-Lease Report, p. 42. It is not only that food sustains the producers of munitions and other war supplies essential to the continuance of the war effort, or

that starvation at home may cause the collapse of a nation not defeated on the fighting front. The army's food supply program is even more directly concerned with civilian supplies. When a belligerent is on the verge of food exhaustion, any increase in its supply inures to the benefit of the armed forces, dependent as they are on the total volume of national food resources. If a nation lacks sufficient food, its army must inevitably suffer. For these reasons, in the first war, the British courts and government insisted that shipments of food, intended for civilian consumption, be considered contraband. *The Hakan* (1918) A. C. 148, 151;[21] *The Kim* (1915) Prob. Div. 215, 281. The American contraband list of 1917 also included "all kinds of fuel, food, food-

[21] In *The Hakan*, the Judicial Committee of the Privy Council said:

"* * * * It may be quite true that their ultimate application * * * would have been to feed civilians, and not the naval or military forces of Germany; but the general scarcity of food in Germany has made the victualling of the civil population a war problem. Even if the military or naval forces of Germany are never supplied with salted herrings, their rations of bread or meat may well be increased by reason of the possibility of supplying salted herrings to the civil population. Under these circumstances, the inference is almost irresistible that the goods were intended to be applied for warlike purposes * * *."

See Pyke, *The Law of Contraband of War*, p. 98:

"Foods may be imported for the use of civilians, but it is quite certain that if the army wants them it will take them."

stuffs, feed, forage." 7 Hackworth, *Digest of International Law*, p. 23.

In World War II, no one has questioned the general place of food in war supplies. The Lend-Lease Act expressly included among "defense articles" "* * * the usual implements of war, such as guns, airplanes, and tanks, and also the food, clothing, medical supplies, and the like, without which warring nations would be helpless." S. Rep. No. 45 (to accompany H. R. 1776), 77th Cong., 1st Sess., p. 2. Phosphates, fertilizers, and foodstuffs were included in the lists of items covered by the Export Control Act of July 2, 1940, sec. 6, 54 Stat. 712, which applies to "any military equipment or munitions, or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operation thereof." See 6 F. R. 1300, 1301, 1540, 3591. As the Committee on Appropriations of the House of Representatives had occasion to say, in reporting the first wartime Department of Agriculture Appropriation bill to the 77th Congress in March 1942: "Food, derived almost entirely from agricultural products, is one of those resources. It is rated as a war material of importance equal to that of munitions, ships, airplanes, and fuel oil. Upon the ability of American agriculture to produce food of the right kind, and in sufficient quantities for our Allies as well as for ourselves, the outcome of the present world conflict will in great part

depend." H. Rep. No. 1848, 77th Congress, 2d Sess., pp. 1–2.

The desperateness of Britain's food situation in 1941 is now common knowledge. Normally a country importing 63% of her foodstuffs, she found her ordinary continental resources of supply cut off by the German offensive of 1940, and her overseas importations drastically reduced by submarine warfare. In addition, the ever-decreasing shipping space available to her had perforce to be stocked with munitions and raw materials for domestic munitions production, and precious foreign exchange was likewise primarily spent on these arms and materials. In the spring of 1941, there was only a few weeks' reserve supply of food left in the United Kingdom, and the Axis had almost succeeded in starving Great Britain into utter defeat. It was at this time that the first lend-lease shipments of food arrived from the United States, and successive shipments in 1941 "tided Britain over her most serious food crisis of the war." Stettinius, *Lend-Lease, Weapon for Victory*, pp. 96–98; Third Report, chap. 5, "The Food Front". These shipments were necessary to sustain the soldiers and sailors of the British Army and Navy, the fliers of the R. A. F., the war workers, the air-raid wardens and the other fighting men and women of Britain—all of whom constituted, in 1941, our first line of military defense against Germany. But food from the

United States was not enough. It was equally necessary for Great Britain to decrease her reliance on sea-borne supplies and to increase domestic production in order to meet her food needs. Ships had to be reserved for implements of war and articles unobtainable in the United Kingdom; submarine packs constantly threatened to interrupt the flow of subsistence; American food supplies were far from sufficient for all needs. As the parties have stipulated (No. 56, R. 15; No. 57, R. 18), "it was necessary to put into production a large acreage of land not normally used for the production of food for direct human consumption, and phosphate fertilizers had to be imported and distributed to effectuate this revised agricultural program. * * * In 1941, the United States was the only practical source [North Africa, the normal source of phosphates, was still in German hands] from which Great Britain could acquire such materials." It was in fulfillment of this program of intensified food production that President Roosevelt personally signed the directive under which these phosphates moved to Great Britain, and the later shipments followed (No. 57, R. 10–11).

Great Britain used these life-saving imports of fertilizer so well, along with the other factors in its intensified program,[22] that by the end of

[22] These other factors included (a) increased use of lend-lease farm machinery; (b) "plowing up and planting grasslands, parks, lawns, golf courses and other areas" (Eleventh

1942 it was raising 60% of its total food supply (Eighth Report, p. 42) and by the middle of 1943, the figure was 70% (Eleventh Report, p. 26). "These gains could not have been made, however, without the aid of seeds, fertilizers and farm machinery from the United States. Our superphosphates have made it possible to get good crops from the many acres of marginal land that would otherwise be almost useless." Stettinius, *op. cit., supra,* p. 257; Hendrickson, *The Food Crisis* (1943) pp. 154–5; Twentieth Report, p. 19.[23] The food which was the product of these urgent efforts supplied the British armed forces, the British civil population which was totally mobilized in support of the war, and, ultimately, in part, our own troops, through reverse lend-lease. See Twelfth Report, p. 5, and Nineteenth Report,

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Report, p. 26); (c) forced plantings which in the long run would wear down the fertility of the soils, thus deliberately choosing food over future fertility (Hendrickson, *The Food Crisis* (1943) p. 155; (d) revolutionary change in eating habits from meat to cereal-eating (Stettinius, *Lend-Lease Weapon for Victory*, p. 256).

[23] Lend-lease shipments of agricultural commodities to the Union of Soviet Socialist Republics, and certain other of the United Nations, were equally decisive. The Germans had ravished Russia's great granary, the Ukraine, and shipments of food were needed to maintain the rations of the Soviet Army, which could not be supplied internally, even though civilian consumption was cut to the bone. Tenth Report, p. 21; Fourteenth Report, p. 11; Fifteenth Report, p. 28; Stettinius, *op. cit., supra,* pp. 226–228.

p. 32. Above all, this food helped to keep Great Britain a powerful factor in the coalition waging war to defeat the Axis powers. Even with its help, the United States had to continue to lend-lease 10% of Britain's food requirements, an extremely important percentage which raised Britain's food production to the level of a "minimum efficiency diet" and "constitutes the margin between having enough so that she can fight effectively and not having enough to carry on." Eleventh Report, p. 27; Nineteenth Report, p. 28. Without Britain's increased domestic production of food, either valuable shipping space desperately needed for guns and tanks and planes would have had to have been filled with food from the United States, its food supply already overburdened, or, and there is no mistaking this, Great Britain would not have been able to continue to wage war effectively.

That Great Britain should not be overwhelmed by the Axis was the cardinal point of our defense policy in 1941, and a first principle of our war policy from Pearl Harbor to the collapse of the Axis nations. These phosphate shipments had the direct function of keeping Britain actively in the fight against Germany. That end was military, and the use of the phosphates to achieve that goal, even if initially through civilian farmers, was decidedly a military and not a civil use.

II

THE HISTORY AND BACKGROUND OF THE TRANSPORTATION ACT OF 1940, AS WELL AS ITS LANGUAGE, SUPPORT THE VIEW THAT CONGRESS INTENDED TO CONTINUE LAND-GRANT RATES FOR ALL GOVERNMENT PROPERTY MOVING FOR THE MILITARY PURPOSE OF SECURING THE NATIONAL DEFENSE

A. THE HISTORY AND BACKGROUND OF THE LAND-GRANT PROVISION OF SECTION 321 (A)

1. *Land-grant deductions prior to 1940.*—The Court is familiar with the general history of the grant of public lands to the railroads and their obligation to transport all Government property and troops at reduced rates. See *Southern Pacific Co.* v. *United States*, 285 U. S. 240, 242–4; *Southern Railway Co.* v. *United States*, 322 U. S. 72, 73–74; cf. Federal Coordinator of Transportation, *Public Aids to Transportation* (1938), Vol. II, pp. 3–45; *Note, Land Grant Railroad Rates* (1940), 8 Geo. Washington L. Rev. 930; Board of Investigation and Research, *Public Aids to Domestic Transportation* (1944), H. Doc. No. 159, 79th Cong., 1st Sess., pp. 55–57, 107 *et seq.* The Seaboard's predecessor, for instance, received a grant of land in Florida with the usual condition that the "said railroads * * * shall be and remain public highways for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops

of the United States." Act of May 17, 1856, c. 31, 11 Stat. 15, 16. An extended controversy over the extent of the railroads' obligation under a grant of this character was finally determined, in 1877, by this Court's holding that such grants reserved to the Government only the free use of the roadbed and not the free use of the rolling stock. *Lake Superior and Mississippi Railroad Co.* v. *United States,* 93 U. S. 442. Following this decision, the Court of Claims, on suit by railroads for freight charges withheld by the Government, held that a reduction of fifty percent from the ordinary commercial tariffs was a "fair deduction" for the use of their respective railroads. *The Atchison, Topeka and Santa Fe Railroad* v. *United States,* 15 C. Cls. 126, 138, 148 (1879). Thereafter, Congress provided in each Army appropriation act for the payment of land-grant rates at fifty or, in one instance, at sixty percent of the commercial rates, as determined by the "proper accounting officers." In the Army Appropriation Act of July 16, 1892, c. 195, 27 Stat. 174, 180, Congress standardized the land-grant deduction by providing, again in the form of a limitation on an annual Army appropriation, for the payment "for transportation of troops and munitions of war and military supplies and property," of rates deemed by the Secretary of War to be just and reasonable, but not to exceed fifty percent of the rates charged to private parties. Like provisions were adopted in subse-

quent Army appropriation measures [24], until 1924, when the Army Appropriation Act of June 7, 1924, c. 291, 43 Stat. 477, 486, 10 U. S. C. 1375, embodied the previous annual practice in permanent legislation. The 1924 statute was the governing act until the adoption of the Transportation Act of 1940, and continued thereafter to have its full effect in those cases in which the 1940 Act did not relieve the carriers of their land-grant obligations.[25] Additional reductions were secured by the Government through "equalization agreements," under which land-grant rates were accepted by nonland-grant railroads (such as Atlantic Coast line, respondent in No. 57), so that they might be in a position to compete for Government business. See *Southern Railway Co.* v. *United States*, 322 U. S. 72, 73–74; *Northern Pacific Ry. Co.* v. *United States*, 72 C. Cls. 563; Federal Coordinator of Transportation, *Public Aids to Transportation* (1938), Vol. II, p. 42.

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[24] The Government's accounting officers consistently ruled that these restrictions in the Army appropriation acts were "applicable to the transportation of all Government property regardless of the appropriation chargeable therewith," and the railroads acquiesced in these rulings. See 4 Lawrence, Comp. Dec. 127, 3 Comp. Dec. 724, 21 Comp. Dec. 744, 23 Comp. Dec. 395, 397, and manuscript decisions referred to therein. See also *Northern Pacific Ry. Co.* v. *United States*, 72 C. Cls. 563, 574.

[25] Effective October 1, 1946, the Act of June 7, 1924, is prospectively repealed, in its entirety, by the Act of December 12, 1945, 59 Stat. 606, Appendix, *infra*, pp. 115–116, which abolishes all land-grant deductions.

When these grants were originally made, there was but little transportable Government property other than military, and the expectation clearly was that almost all of the goods transported over the land-grant roads would be supplies for the military establishment, over which the War and Navy Departments would have control.[26] And at least until the third decade of this century, the major portion of the Government property carried at reduced rates was directly connected with the national defense. See Federal Coordinator of Transportation, *Public Aids to Transportation* (1938), Vol. II, pp. 41–43; Hearings before the House Committee on Interstate and Foreign Commerce, 75th Cong., 3d Sess., on H. R. 10620, statement of Commissioner East-

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[26] The promotion of the national defense, through the establishment of adequate railroads, was one major purpose for the making of land grants. Cf. the statement of Senator Seward in the course of a debate on grants in Illinois, Mississippi, and Alabama:

"I trust that the day is far distant when we shall have occasion for any road for the purpose of military defence; but we can all see that the time may come, and we know not how soon it may be, when this and all of our public roads may be required for military purposes. And if it be right in time of peace to prepare for war, then it is right to make these appropriations, which are, after all, most effective securities for peace by preventing war, and are most indispensable works of defence in case of actual war."

22 Cong. Globe, reprinted in Federal Coordinator of Transportation, *Public Aids to Transportation* (1938), Vol II, p. 26.

man, at pp. 6–7, and report of the War Department at p. 16. Congress recognized this basic fact by regularly including its directions concerning land-grant rates in Army appropriation measures, and designating the Secretary of War to determine the just and reasonable amount to be paid for the carriage of all Government property over aided railroads.

2. *Legislative history of the Transportation Act of 1940.*—The depression decade of the 1930's saw the railroads in their most difficult financial crisis. This gave rise to insistent demands that the Government relinquish its land-grant reductions. The two special committees appointed by the President to survey the general condition of the railroads—first, the Committee of Three and, thereafter, the Committee of Six—both recommended the complete abolition of the Governmental deduction (Committee of Three: Report of March 24, 1938, H. Doc. No. 583, 75th Cong., 3d Sess.; Committee of Six: Report of December 23, 1938, printed in Hearings before the House Committee on Interstate and Foreign Commerce, on H. R. 2531, 76th Cong., 1st Sess., Vol. II, pp. 260, 271–272). The Interstate Commerce Commission and Commissioner Eastman (who had been Federal Coordinator of Transportation) concurred. The railroads, of course, enthusiastically favored the proposal. The main reason urged to

support the fairness of this proposal for partially alleviating the carriers' financial straits was the increase, in recent years, of the transportation of Government property. As the Committee of Six said: "There are now 69 different agencies and departments of Government which receive the benefit of these reduced rates, and the number is constantly increasing. This traffic has grown to a volume far in excess of anything that could possibly have been in contemplation of the parties at the time the land grants were made."

Early in 1938, in order to effectuate the recommendation of the Committee of Three, there was introduced into the 75th Congress H. R. 10620, a simple measure to remove all existing land-grant reductions. At about the same time, Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce, introduced a similar bill at the request of the Committee of Three (83 Cong. Rec. 7054), S. 3876. No public hearings appear to have been held by the Senate Committee on Interstate Commerce, but it unanimously recommended an amendment that "such applicable commercial rate shall not be paid for the transportation of men, officers, or personnel in any branch of the military or naval service and military or naval property" (S. Rep. No. 1791, 75th Cong., 3d Sess.). The introduction of this exception was described by R. V. Fletcher, General Counsel of the Association of American Railroads, in his con-

temporaneous testimony on the House bill, H. R. 10620, before the House Committee on Interstate and Foreign Commerce:

> * * * we have never been able to understand why there should be, certainly at least in times of peace, any provisions that the commercial rates should not be paid for the transportation of men, officers, and personnel in the military or naval service, and military and naval property. * * * there was a conference in Senator Wheeler's office * * * and this land-grant matter, which was in the agenda, came up for discussion. Senator Wheeler asked if the railroads would object to having a clause put in the bill which would permit the application of these reduced rates in time of war, and we said that we would not object to a clause of that kind, and I thought that was the understanding; but when the bill came out of the committee it had this broad provision, which excepted military property, and the transportation of troops, even in times of peace, which was not what I hoped would be the conclusion of the committee. [Hearings before the House Committee on Interstate and Foreign Commerce, 75th Cong., 3d Sess., on H. R. 10620, June 1, 1938, p. 32.]

At the request of Senator Wheeler, S. 3876 was recommitted to the Committee on Interstate Commerce, before any action was taken by the Senate,

and the bill died with the 75th Congress (See 83 Cong. Rec. 7054).

The House Committee on Interstate and Foreign Commerce held extensive hearings on H. R. 10620. Representatives of the railroads and railroad unions appeared to urge the total abolition of the reductions, as did Commissioner Joseph B. Eastman. Repeated reference was made to the great increase of Government transportation caused by the relief and emergency activities of the new federal agencies established in the thirties. See Hearings on H. R. 10620, pp. 6–7 (statement of Commissioner Eastman); p. 16 (War Department report); pp. 39–41 (R. V. Fletcher, General Counsel, Association of American Railroads); p. 79 (C. S. Duncan, Economist, Association of American Railroads.)[27] Opposed to repeal of the reductions was the Procurement Division of the Treasury Department, a major Government purchasing agency. The War Department adopted the exception for "military or naval property," which had been inserted in the Senate bill, S. 3876, and strongly suggested a similar proviso to H. R. 10620 (See Hearings on H. R. 10620, *supra*, pp. 16–17). In this connection, it is also

[27] Duncan stated: "I refer here to the fact that these provisions in the land grants, requiring reductions in rates on Government traffic, are made to apply today to all sorts of projects having nothing at all to do with military affairs. They apply on materials for T. V. A., for P. W. A., and W. P. A. projects."

significant, we think, that there was not absent from the House Committee on Interstate and Foreign Affairs, even in the spring of 1938, an appreciation of the possibility of international strife, as the following colloquy between Congressman Pearson and Mr. Eastman shows:

> Mr. PEARSON. * * * It occurs to me that the outlook at the present time is such that it might be a little unfair to the Government to enact this proposal into law and then find ourselves, possibly, in a state of war and the Government called upon to pay for the transportation of troops and supplies at full cost, whereas the railroads are already obligated under their original acceptance of these land grants to transport troops and supplies at reduced rates.
>
> Of course, that might be a farfetched view of it, but I do not think there is any gainsaying the fact that conditions in the world are such that we do not know when a state of war might be declared, and this proposal can carry with it a tremendous expense for the Government at a time when it could least afford to bear that expense.
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> Mr. EASTMAN. That matter was not taken into consideration by the committee which reported to the President. [Hearings on H. R. 10620, pp. 8–9.]

However, the Committee reported H. R. 10620 without including the exception for military and naval property (H. Rep. No. 2694, 75th Cong.), but no action was taken by the 75th Congress.

In the 76th Congress, the effort to abolish the Government's land-grant rate privileges was resumed. In the Senate, two separate bills were introduced to accomplish this purpose: S. 1915 called for complete repeal, and S. 1990 followed S. 3876 of the 75th Congress in retaining the reduction for military property. Hearings on the two measures were held by the Senate Committee on Interstate Commerce, at which railroad representatives repeated their arguments for complete repeal, and the Treasury and Interior Departments opposed.[28] Hearings before a Subcommittee of the Senate Committee on Interstate Commerce, 76th Cong., 1st Sess., on S. 1915, S. 1990, and S. 2294, June 5, 1939. Neither of these bills was acted upon by the Committee or by the Senate. In the House of Representatives, instead of the introduction of separate bills, a provision completely cutting off the land-grant reduction was incorporated in H. R. 2531, the omnibus transportation bill which was intended to embody the various current official recommendations for the relief and rehabilitation of the railroads. At the hearings on H. R. 2531, little time was given to the land-grant provision, and the Committee was mainly referred to the testi-

[28] The Interior Department suggested that, if Congress were to repeal the land-grant requirements, the carriers be compelled to return all public lands still in their possession, and the Department of Justice favored a release of all claims not yet settled. It is probable that Section 321 (b) of the Transportation Act of 1940 emerged from proposals such as these.

mony on H. R. 10620 of the 75th Congress (Hearings before the House Committee on Interstate and Foreign Commerce, 76th Cong., 1st Sess., on H. R. 2531, H. R. 188, and H. R. 4862, pp. 57–58, 160, 184–185, 652–654, 1725), but again it is significant that stress was laid upon the then recent increase in the shipment by the Government of "commercial" and "non-military" goods.[29]

The Senate's omnibus transportation bill, S. 2009, which was entirely silent as to land-grant rates,[30] passed that body on May 25, 1939, before the House Committee had completed its action on H. R. 2531. In reporting S. 2009 to the House, the Committee adopted the common device of substituting its own omnibus bill, which contained a section, 321 (a), requiring the payment of full commercial rates by the Government. The Committee's report (H. Rep. No. 1217, 76th Cong., 1st Sess., p. 27, July 18, 1939) merely para-

[29] Mr. Carl R. Gray, Vice-Chairman of the Board of Directors of the Union Pacific Railroad Company, and a member of the Committee of Six, said:

"It [the land-grant obligation] is growing in this way, that no one had any conception or could have had any conception in the sixties and seventies that this Government would be in every class of business that exists in this country, even in the provisions and shipments of food; every kind of material; all of those commercial things that were not in the picture whatever at that time." Hearings, *supra*, at p. 185.

[30] Hearings before the Senate Committee on Interstate Commerce, 76th Cong., 1st Sess., on S. 1310, 2016, 1869, and 2009 (Transportation Act of 1939) contains nothing significant on this matter.

phrases the provision, but the debate in the House plainly indicates that the supporters of total repeal of the land-grant reduction were largely moved by the recent progressive increase in Government shipments by emergency and relief agencies, such as the P. W. A. and W. P. A. It was strongly emphasized that the type of shipments made in the years 1933–1939 differed radically from the military supplies which it was originally contemplated would be carried on behalf of the Government.[31]

[31] Rep. HINSHAW. "Since all of this has taken place, the Government has gone into the freight-moving business more and more. The transport of troops and the transport of materials is a very small matter now, and has been a small matter over many years. Now, the Government of the United States is transporting in the hundreds and thousands of tons every conceivable kind of commercial freight you can imagine—steel, cement, food products, and everything else, for the building of roads, dams, post offices, schools, and so forth—so the Government has put upon these roads a tremendous burden which was not contemplated when the lands were originally granted." (84 Cong. Rec. 10114–10115.)

Rep. WADSWORTH. "May I interpolate that for the last 5 or 6 years Government shipments have increased tremendously. Not only do the normal shipments continue, but every time the Government makes a grant for the building of a schoolhouse or the construction of a new waterworks in some town the raw material for the construction is shipped under a Government tag, and the railroad must carry it at a 50-percent reduction. You all realize what an enormous amount of that has been going on in the last 3 or 4 years, and apparently, unless certain conditions change, there will be no end to it." (84 Cong. Rec. 10117.)

Rep. MARTIN. "The entire picture has changed since the land grants were made over 70 years ago. There is abso-

As passed by the House (on July 26, 1939, before the outbreak of World War II), the omnibus transportation bill retained the provision completely abolishing the Government's reduction. 84 Cong. Rec. 10121, 10127. Because of the press of other matters, and Congressional recesses, as well as the difficulty of the task of resolving the differences between the two Houses, the conference committee did not report until late in April 1940, eight months after the beginning of World War II. The committee agreed upon the provision which now appears in Section 321 (a) of the Transportation Act of 1940, including the exception for "military or naval property of the United States moving for military or naval and not for civil use." There was extended debate in both bodies on the conference's bill, but attention was focused on other matters and there was no discussion of the land-grant section. The confer-

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lutely no comparison between conditions then and now, yet the obligations of the railroads will increase permanently." (84 Cong. Rec. 10117.)

Rep. LEA (in charge of the bill). "At the time those grants were made the traffic for the Government was trivial. The main thing under contemplation was the movement of military men and supplies. * * * In 1937 there were $7,000,000 in freight and almost $3,000,000 in mail advantage to the Government, making a total for the Government of about $10,000,000 a year on account of this concession. That figure for 1937 reflects the greater Government tonnage, due largely to construction activities." (84 Cong. Rec. 10118.).

Rep. CASE. "Today most of the heavy-materials business is public buying. Everybody knows that. There is little private construction." (84 Cong. Rec. 10131.)

ence reports (H. Rep. 2016, 76th Cong., 3d Sess., April 26, 1940, p. 87, and H. Rep. 2832, 76th Cong., 3d Sess., August 7, 1940, p. 93) merely state that the conference substitute changes the House proposal "by making an exception from this requirement of the payment of full commercial rates by the United States, in the case of the transportation of military or naval property moving for military or naval use, and in the case of the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty. In the case of transportation thus excepted, existing legal requirements and arrangements providing for reduced rates will continue to apply."

S. 2009 became the Transportation Act of 1940 on September 18, 1940. By that time, World War II had been waged for over a year; in April 1940, Norway had been invaded by Germany; early in May had come the blitz attacks on France, Belgium, and Holland; in June, Italy had delivered its "stab in the back"; France and the low countries had fallen; in August, daily mass bombings of Britain had begun; and, as we now know, Hitler planned to invade the British Isles on September 21, 1940. As the court below described it, "Sympathies in this country then ran strongly against the Axis powers; it was pretty generally agreed that we should help the enemies of the Axis; there was real fear that the

United States might become involved in the conflict; swift measures for defense had to be perfected on an extremely wide scale" (No. 56, R. 32).

We are not yet too distant to recall that in the summer and fall of 1940, for the first time since 1918, military defense measures were foremost in the Congressional mind. Congress was preoccupied with providing for the defense of the land, and it is only natural that this preoccupation should have contributed to the insertion of the land-grant proviso in Section 321 (a) of the Transportation Act of 1940. The Congress at that time was visibly aware of the possibility of war, and was concerned with making accommodations necessary to enable the Government to convert to a wartime basis, if the threatened war should come. The legislation enacted during this lull before the storm shows that Congress was concerned lest its enactments would put burdens on the Government which might discommode it in prosecuting a war. Only to list the more important national defense acts adopted by the Congress during the period of June 1, 1940 through October 15, 1940, makes this clear.[32] The Transportation Act of 1940 itself

[32] June 11, 1940, 54 Stat. 265, 292, 297—making appropriations for the naval establishment for the fiscal year ending June 30, 1941.

June 13, 1940, 54 Stat. 350, 377—making appropriations for the military establishment for the fiscal year ending June 30, 1941.

June 14, 1940, 54 Stat. 394—An Act to establish the composition of the United States Navy, to authorize the

explicitly provides, in the declaration of national transportation policy, that one aim of the statute

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construction of certain naval vessels, and for other purposes.

June 15, 1940, 54 Stat. 396—Joint Resolution to authorize the Secretaries of War and Navy to assist the governments of American republics to increase their military and naval establishments, and for other purposes.

June 15, 1940, 54 Stat. 400—An Act to authorize the construction or acquisition of naval aircraft, the construction of certain public works, and for other purposes.

June 20, 1940, 54 Stat. 492—An Act providing for the reorganization of the Navy Department, and for other purposes.

June 25, 1940, 54 Stat. 516—Revenue Act of 1940 (5 year defense tax).

June 26, 1940, 54 Stat. 599—First Supplemental National Defense Appropriation Act, 1941.

June 28, 1940, 54 Stat. 670—Alien Registration Act, 1940.

June 28, 1940, 54 Stat. 676—An Act to expedite the national defense, and for other purposes.

July 2, 1940, 54 Stat. 712—An Act to expedite the strengthening of the national defense.

July 19, 1940, 54 Stat. 779—An Act to establish the composition of the United States Navy, to authorize the construction of certain vessels, and for other purposes.

August 27, 1940, 54 Stat. 858—Joint Resolution to strengthen the common defense and to authorize the President to order members and units of reserve components and retired personnel of the Regular Army into active military service.

August 27, 1940, 54 Stat. 864—Naval Aviation Personnel Act of 1940.

September 9, 1940, 54 Stat. 872—Second Supplemental National Defense Appropriation Act, 1941.

September 16, 1940, 54 Stat. 885—Selective Training and Service Act of 1940.

September 16, 1940, 54 Stat. 897—An Act to authorize the Reconstruction Finance Corporation to make loans for the development of deposits of strategic and critical min-

is the establishment of a national transportation system "adequate to meet the needs . . . of the national defense," and that all of the provisions of the Act "shall be administered and enforced with a view to carrying out the above declaration of policy." In the formulation of other relevant general legislation during this period, the national defense was also constantly in mind. The Federal Highways Act of 1940, 54

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erals which in the opinion of the Corporation would be of value to the United States in time of war.

September 18, 1940, 54 Stat. 898—Transportation Act of 1940.

September 24, 1940, 54 Stat. 958—Joint Resolution making additional appropriations for the Military Establishment for the fiscal year ending June 30, 1941.

October 8, 1940, 54 Stat. 965—Third Supplemental National Defense Appropriation Act, 1941.

October 8, 1940, 54 Stat. 974—Second Revenue Act of 1940, including:

Title II—Excess Profits Tax Act of 1940
Title III—Amortization Deduction.
Title IV—Suspension of Profit-Limiting Provisions of the Vinson Act and certain provisions of the Merchant Marine Act, 1936
Title VI—National Service Life Insurance

October 9, 1940, 54 Stat. 1029—Assignment of Claims Act of 1940.

October 10, 1940, 54 Stat. 1090—To authorize the President to requisition certain articles and materials for the use of the United States, and for other purposes.

October 17, 1940, 54 Stat. 1178—Soldiers' and Sailors' Civil Relief Act of 1940.

October 17, 1940, 54 Stat. 1201—To require the registration of certain organizations carrying on activities within the United States, and for other purposes.

Stat. 867, 868, 871–872, provided, for instance, that federal funds made available to states without matching should be expended "in the construction of projects desirable from the standpoint of national defense", and that priority was to be given to national defense projects. Moreover, Congress was particularly concerned not to burden defense activities with normal restrictive requirements. Competitive bidding and other rules of Government contracting were partially suspended by the Act of July 2, 1940, 54 Stat. 712, and contemporary provisions in appropriation acts; the rules as to assignment of claims against the Government were loosened by the Assignment of Claims Act, 54 Stat. 1029; "to expedite national defense", the eight-hour law was suspended for Maritime Commission contracts, Act of October 10, 1940, 54 Stat. 1092. A proviso to a comprehensive statute providing for the safe carriage of explosives (Act of October 9, 1940, 54 Stat. 1023, 1025) ensured that the Act would not "prevent the transportation of military or naval forces with their accompanying munitions of war and stores". The Communications Act of 1934 was amended to permit communication utilities to provide "free service in connection with the preparation for the national defense", Act of June 25, 1940, 54 Stat. 570. The Walter-Logan administrative procedure bill, vetoed by the President, exempted the military and naval establishments from its requirements. See S. Doc. No. 145, 76th Cong., 3rd Sess.

The purposes Congress sought to attain through the land-grant provision of the Transportation Act of 1940 are thus clear. Moved by the enormously increased use of the land-grant privilege for nonmilitary emergency and relief shipments during the years of depression,[33] Congress

[33] That this was the prime factor in Congressional action in 1940 is amply confirmed by many statements in the legislative materials on the various attempts, from 1942 to 1946, to repeal the exception for "military or naval property." For instance, see H. Rep. No. 1910, 77th Cong., on H. R. 6156, p. 4, referring to the enormous increase in certain supplies in the thirties; H. Rep. No. 1408, 78th Cong., on H. R. 4184, p. 3, with similar reference; H. Rep. No. 393, 79th Cong., on H. R. 694, p. 3, and S. Rep. No. 552, 79th Cong., on H. R. 694, p. 4, both stating:

"In the Transportation Act of 1940, because of the enormous increase in recent years, and particularly during the years of depression, in the nonmilitary activities and traffic of the Government, Congress deemed it proper to make the land-grant reductions inapplicable, so far as concerns the transportation of property, to anything except 'military or naval property of the United States moving for military or naval and not for civil use.'"

In the debate on H. R. 694, 79th Congress, which became Public Law No. 256 (Act of December 12, 1945, printed in the Appendix, *infra*, pp. 115–116), Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce, said:

"The Act of 1940 which, as I said a moment ago, the present President of the United States, as a member of the Interstate Commerce Committee, was very much interested in having enacted, amended the prior act so as to except from the land-grant rates the civilian goods which were being shipped for relief purposes, because it was contended by him and by everyone else who gave the subject thought, that it was never intended in the original act that civilian goods should receive the deduction provided by land-grant rates. So the

desired to return to the original purpose of the reduction, which was to insure the easy and cheap transportation of property connected with the national defense. The railroads and shippers, as well as a substantial segment of the Congress, would doubtless have preferred to abolish the Government's deduction completely;[34] but the

law was amended without any debate at the time" (91 Cong. Rec. 9234).

And, again:

"The law remained in this status until 1940. In considering the Transportation Act of that year, Congress was advised that in the depression period, extending roughly from 1930 to 1940, the Government had been a very large shipper of civilian goods, which were being distributed for relief purposes. There had been a great increase in the amount of land grant deductions since, under the law prior to 1940, the reduced rates applied to all Government property whether military or civilian. Congress reached the conclusion in 1940 that it was unfair to the railroads to require them to apply reduced rates to ordinary civilian goods, and the law was amended * * *." (91 Cong. Rec. 9228).

[34] See the statement of Congressman Holmes at the Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 78th Cong., 2d Sess., on H. R. 4184, pp. 130–131:

"* * * I happened to be a member of this committee at the time of the adoption of the 1940 act, and as a matter of fact a member of the conference committee between the House and the Senate on the adoption and I think for my friend's benefit, the general feeling of most of the members of the committee who had this legislation under consideration, was that there should be an elimination of the land-grant rate; they were of the opinion at that time that the rates should be abolished entirely, but apparently did not have the votes to do it, so we took advantage of the situation and made the best bargain we could to relieve the railroads of a part of the responsibility."

Congress refused to take this drastic step, and went no further than to correct the unduly enlarged use of the land-grant privilege for relief and public works shipments, by restoring the reduction to its initial aim of facilitating the national defense. And, in 1940, the course of the European war, with which we were increasingly concerned, underlined the urgent need for promoting, rather than frustrating, the national defense, in peacetime as well as in war.[35] As Judge Hutcheson said in the District Court (No. 56, R. 25):

> * * * the Act was passed at a time when there existed a threat of involvement

[35] The broad Congressional view of the needs of national defense is discussed in detail, *infra*, at pp. 98–103. For instance, the anti-sabotage acts of 1918 and 1940 broadly defined "war material" and "national defense material" to cover all supplies intended for war or national defense use. Act of April 20, 1918, 40 Stat. 533; Act of November 30, 1940, 54 Stat. 1220, 50 U. S. C. 101–106. The Act of July 2, 1940, 54 Stat. 712, gave broad powers of procurement to the War Department in order "to expedite the strengthening of the national defense;" similarly with the Act of June 28, 1940, 54 Stat. 676, Title II of which also authorized new housing "in connection with the national defense programs." The Export Control Act of 1940 (Section 6 of the Act of July 2, 1940), and the property requisitioning Acts of 1940 (Act of October 10, 1940, 54 Stat. 1090) and 1941 (Act of October 16, 1941, 55 Stat. 742) dealt with export control or requisition "in the interest of national defense" of "any military equipment or munitions, or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operation;" for Congressional recognition of the breadth of these terms, see *infra*, pp. 102–103. Cf. *Gorin* v. *United States*, 312 U. S. 19, 28.

> of this country in total war on a world-wide stage, the serious nature of which is realized when it is recalled that the threat resulted in an accomplished fact within less than fifteen months from the time Congress acted. The United States along with the world, was a close observer of the methods of waging "total war" and Congress was fully aware that modern wars engage the full resources of belligerent nations.

And the Circuit Court of Appeals for the Seventh Circuit has said, in *Northern Pacific Railway Company* v. *United States,* pending on writ of certiorari, No. 400 (R. 46–47):

> At the time of the enactment of the Transportation Act of 1940, it was obvious that the general needs of security demanded a greatly expanded Army and Navy. Such enlarged military and naval forces would demand supplies and equipment far in excess of the then existing reserves. With the war spreading throughout Europe in 1940, and with the knowledge of the meagre and inadequate military strength of the United States, it is most unrealistic to presume that Congress intended any restrictive meaning of "military and naval property" as used in the Transportation Act of that crucial year. To define "military and naval property" in any narrow sense would be to close one's eyes to the complexities and realities of modern war. We will not impute to Congress such lack of vision.

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* * * Congress acted while total war raged in Europe and in contemplation of our situation if total war came to us, which it did.

3. *Legislative history of the Act of December 12, 1945, 59 Stat. 606 (abolishing all land-grant rates).*—This reading of Congressional land-grant rate policy, as embodied in the Transportation Act, is supported, we believe, by the legislative history of the successive attempts to complete the full repeal of the reduction, which was finally accomplished in Public Law No. 256, 79th Congress, the Act of December 12, 1945, Appendix, *infra*, pp. 115–116. These attempts [36] began with the 77th

[36] 77th Congress: 1. H. R. 5598, proposing to limit the deduction to the transportation of "munitions and implements of war and property necessary of the maintenance and subsistence of the armed forces of the United States"; never acted upon by Committee or House.

2. S. 2144; never acted upon by Committee or Senate.

3. H. R. 6156, to repeal the exception entirely:

Hearings: Hearings before the House Committee on Interstate and Foreign Commerce, 77th Cong., 2d Sess., on H. R. 6156, February 19 and 20, 1942.

Report: H. Rep. No. 1910.

Debate: 88 Cong. Rec. 3729, 3786–3804.

Action: Recommitted by the House to the Committee on Interstate and Foreign Commerce, 88 Cong. Rec. 3804.

78th Congress: 1. S. 638; no action taken by Committee or Senate.

2. H. R. 4184, to repeal the exception entirely:

Hearings: (a) Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 78th Cong., 2d Sess., on H. R. 4184, March 16, 17, 18, 21, 22, 23, 1944. (b) Hearings before a Subcommit-

Congress (1941–1942), and continued through the 78th Congress (1943–1944) and the present Congress, the 79th (1945–1946). Here we need only point out those which bear upon our question. There should first be noted the continued refusal of Congress to repeal the exception for military property so long as the war continued. During the national defense and war periods (1940–1945), the greatly expanded traffic incident to the total national mobilization admittedly brought the railroads to their all-time highest level of earnings, and poverty could no longer be pleaded in chief justification of abolition of reduced Government rates, as the Committee of Three, the Committee of Six, and the railroads had so strenuously urged in 1938 and 1939. Nevertheless, the carriers made

tee of the Senate Committee on Interstate Commerce, 78th Cong., 2d Sess., on H. R. 4184, June 8, 9, 13, 14, August 18, 19, 1944.

Reports: H. Rep. No. 1408; S. Rep. No. 1208.

Debate: 90 Cong. Rec. 4874–4913 (House).

Action: Passed by House; reported favorably to Senate, with amendments, but no action taken by Senate.

79th Congress: H. R. 694, to repeal the exception entirely:

Hearings: None.

Reports: H. Rep. No. 393; S. Rep. No. 552; Conference reports printed in 91 Cong. Rec. 10136–8 and 91 Cong., Rec. 10266.

Debate: 91 Cong. Rec. 4183–4201, 9225–9241, 9303–9308, 9309–9322, 9376–9377, 9383–9396, 10101–10110, 10136–10143, 11266–11273, 10859–10860.

Action: Passed and enacted into law, as amended, to provide prospective repeal from October 1, 1946. Public Law No. 256, Act of December 12, 1945, 59 Stat. 606.

elaborate and repeated presentations of the progressive increase in their land-grant shipments during the war, and pressed upon the Congress the asserted improper breadth of the Government's interpretation of the statute's coverage. But Congress was not persuaded and each bill failed of enactment until, in December 1945, Congress agreed to cut off the land-grant reduction beginning October 1, 1946, when it could not be said "that the war effort will in any way be hampered or handicapped by the repeal of the special rates." See statement of Congressman Boren, 91 Cong. Rec. 11268.[37] The earlier bills met sturdy and successful opposition, particularly in the Senate, because they would have abolished reduced rates during the war. See statements of Senator Wheeler on October 2, 1945, 91 Cong. Rec. 9227, 9233.

In this connection, it is also relevant to note the attitude of the various members of Congress toward the carriers' claim that the Government was improperly stretching the terms "military or naval property." The railroads diligently set forth, in some detail, the controversies which had arisen with respect to lend-lease shipments, raw

[37] Section 2 of the Act of December 12, 1945, provides that "any travel or transportation specifically contracted for prior to such effective date [i. e., October 1, 1946] shall be paid for at the rate, fare, or charge in effect at the time of entering into such contract of carriage or shipment." The Act does not, therefore, affect the shipments involved in these cases.

materials, supplies for the construction of cargo vessels, and other disputed claims. See Hearings before the House Committee on H. R. 6156, p. 2, 39, 46 *et seq.*, 51; Hearings before the House Committee on H. R. 4184, p. 56, 130–1; Hearings before the Senate Committee on H. R. 4184, p. 23. Another of the major arguments for the total abolition of land-grant rates was the asserted difficulty of interpreting Section 321 (a) without prolonged controversy. See H. Rep. No. 393, 79th Cong., p. 8; H. Rep. No. 1408, 78th Cong., p. 7; 90 Cong. Rec. 4881, 4895–6 (debate on H. R. 4184, 78th Cong); 91 Cong. Rec. 9234, 9304, 11268 (debate on H. R. 694, 79th Cong.). These matters were squarely placed before the Congress and considered by it, both in committee and on the floor. But nowhere in the hearings, the reports, or the debates, is there any indication that any member of Congress, including those who had been members of the 76th Congress and had piloted the Transportation Act, viewed the Government's construction of the military property exception as beyond the intention of the earlier Congress. We do not claim that Congress has ratified or approved the interpretation we urge, since it is clear from the debates on the Act of December 12, 1945, and prior discussion, that Congress intended that these controversies be settled judicially.[38] But, at the very

[38] See, *e. g.* statement of Senator Wheeler:

"It should be made perfectly clear that the passage of the bill resulting in the repeal of land-grant rates will have no

least, one may conclude that Congress has found nothing improper in the Government's reading of Section 321 (a). By like token, it is clear that the lower courts and respondents err in their claim that later Congresses have approved or ratified the narrow interpretation that only actual "munitions of war" were entitled to land-grant rates (No. 56, R. 26, 32).

B. THE LANGUAGE OF THE STATUTE

Respondents and the courts below have mainly rested on the contention that the words of Section 321 (a) are traditionally so narrow in content as to preclude coverage of the lend-lease shipments here involved. We submit, however, that, in the first place, the meaning of the term "military" depends largely on the context in which it is found; and, secondly, that, under the applicable rules of construction and in accordance with its legislative policy, Section 321 (a) should be interpreted to continue land-grant rates for all Government property moving primarily to advance the national defense.

1. *The term "military" has no standard content.*—As this Court has often observed, statutory terms can only be understood by considering, in addition to the general connotation of the words themselves, "the context, the purposes of

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effect whatever upon the controversy as to the proper classification of this material, provided it is moved prior to the effective date of this proposed act." 91 Cong. Rec. 9234.

the law, and the circumstances under which the words were employed." *Puerto Rico* v. *The Shell Co.*, 302 U. S. 253, 258; cf. *Towne* v. *Eisner*, 245 U. S. 418, 425; *United States* v. *American Trucking Assns.*, 310 U. S. 534, 545; *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 124. "Military" is such a word. Neither Congressional nor general usage has given it the status of a term of art. Webster's New International Dictionary defines it, in part, as: "Of or pertaining to soldiers, arms, or war; belonging to, engaged in, or appropriate to, the affairs of war; * * *." Funk and Wagnalls Standard Dictionary likewise states: "Of or pertaining to armed forces, arms, or warfare * * *." Under this general rubric can fall any matter pertaining to war or the national defense; the proper meaning in a particular case, be it narrow or broad, must be determined by considerations largely extraneous to the word itself. This, the judicial history of the term "military" (and related terms) abundantly proves. For instance, the term "military forces" or "military establishment" has frequently been held to include the Navy or Marine Corps (*United States* v. *Dunn*, 120 U. S. 249, 252; *United States* v. *Sweeny*, 157 U. S. 281, 284; 31 Op. Atty. Gen. 445, 452; *In the Matter of Stewart*, 30 N. Y. Super. (7 Rob.) 635; *Maclean* v. *Brodigan*, 41 Nev. 468; *In re the Right of Electors*, 41 R. I.

118); a "soldier" has been held also to be a "sailor" (19 Op. Atty. Gen. 586) as well as a member of the Women's Army Corps. *United States v. Williams,* 59 F. Supp. 300, 301 (W. D. N. Y.). A civilian can with propriety sit on an international "military" tribunal.

During and immediately after World War I, it was held that, for the purposes of the Espionage Act of 1917, the "military or naval forces" of the United States included all males subject to or registered under the draft. *Debs* v. *United States,* 249 U. S. 211, 216–7; *Seebach* v. *United States,* 262 Fed. 885, 888 (C. C. A. 8); *White* v. *United States,* 263 Fed. 17 (C. C. A. 6); *Howenstine* v. *United States,* 263 Fed. 1, 4 (C. C. A. 9); *United States* v. *Sugarman,* 245 Fed. 604 (D. Minn.); but cf. *United States* v. *Hall,* 248 Fed. 150, 153 (D. Mont.), and *United States* v. *Mayer,* 252 Fed. 868 (W. D. Ky.). On the other hand, after the last war, some courts held soldiers who died of influenza or pneumonia, rather than while participating in combat, not to be engaged in military or naval service under insurance policies freeing the company from liability where the insured died while so engaged. See *Boatwright* v. *American Life Insurance Company,* 191 Iowa 253, and cases cited. Under Section 13 of the Criminal Code (R. S. 5286; 18 U. S. C. 25), prohiting the launching from our shores of a "military expedition or enterprise" against a nation

with which we are at peace, some courts have adopted the narrow view that there must exist a well organized body, fashioned in the style of an Army unit (*United States* v. *Pena*, 69 Fed. 983 (D. Del.); *United States* v. *Hart*, 74 Fed. 724 (C. C. S. D. N. Y.); *United States* v. *Hughes*, 75 Fed. 267 (D. S. C.)), while others, looking to the purpose of the statute to prevent foreign embroilments, have held any group with hostile aims within the act. *Wilborg* v. *United States*, 163 U. S. 632, 648–54; *United States* v. *Ybanez*, 53 Fed. 536 (C. C. W. D. Tex.); *United States* v. *Murphy*, 84 Fed. 609 (D. Del.); *United States* v. *Tauscher*, 233 Fed. 597 (S. D. N. Y.).[39]

We present these examples, not in approval or disapproval of their specific holdings, but to show that terms such as "military", "military property", and "military use" are elastic and without uniform standard content. Their meaning changes with the times and the legislature's varying intention. As used in the Transportation Act of 1940, these words cannot be given their correct reading without full appraisal of the purposes of Section 321 (a), and the needs of the period in which they were enacted.

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[39] In the Act of October 17, 1940, 54 Stat. 1201, 18 U. S. C. 14 *et seq.*, providing for the registration of certain subversive or foreign controlled organizations, Congress used the term "civilian military activity", and broadly defined it to include, among other things, any form of "organized activity which in the opinion of the Attorney General constitutes preparation for military action."

2. *Only a broad interpretation will harmonize the Congressional purpose with the terms of Section 321 (a).*—As we have shown, a basic purpose of Congress, in enacting Section 321 (a), was to continue the railroads' land-grant obligations for national defense purposes. For over a year, war had been waging in Europe and Africa, and the aims of the Axis powers were becoming plain to all; both legislative and executive branches of the Federal Government were keenly concerned in strengthening our defenses, so that, unlike 1917, we might be fully prepared should the nation be again involved in war. In this setting, it is not difficult to construe the terms "military or naval property of the United States moving for military or naval and not for civil use" so as to further the Congressional purpose without distorting the language Congress employed. In our view, the statute is properly read as adopting the pragmatic test of "use" rather than as covering only a property which is conventionally or "inherently" of a military nature or a military type; under Section 321 (a), "military or naval property" means all Government property which is "moving for military or naval and not for civil use." The terms "military or naval and not for civil use" are intended to spell out the entire field of "national defense use", which, as this Court stated in *Gorin* v. *United States*, 312 U. S. 19, 28, is a generic but definite concept of broad connotation, referring to

the military and naval establishments and related activities of national preparedness. Thus interpreted, all Government property which is being shipped primarily in aid of the war or of national defense is entitled to the land-grant reduction, regardless of the Government agency which has control over it, of the traditional or "essential" nature of the property, or of the civilian or military character of the persons who are ultimately to use it. We submit that this construction is the only one which fully harmonizes the Congressional purpose with the wording of the section.

The opposing construction, which respondents urge, begins with a narrow definition of "military or naval property" and further restricts the scope of the statute by requiring that even this small class of goods be moving solely for use by the Army or the Navy. Such an interpretation unquestionably thwarts the legislative policy of advancing the national defense. It also imputes to a Congress, fully aware of the complex needs of modern war and daily preparing to satisfy those needs in all other fields, an early nineteenth century conception of necessary war supplies.

Nor does the interpretation we urge excise the words "and not for civil use", as respondents have strenuously argued.[40] Congress included this phrase to emphasize that the national defense use

[40] In view of the stress placed by respondents and the lower courts (No. 56, R. 26–27, 32) on this point, it may be well to point out that the conference reports on the Trans-

must be primary, and to preclude a finding of "military or naval use" on the basis of secondary military aspects or considerations. The normal civil functions of the War Department were probably foremost in the Congressional mind. In peacetime, the improvement of rivers and harbors by the War Department is primarily undertaken for the promotion of general commerce and navigation, as this Court has recognized in an earlier land-grant rate case. *Southern Pacific Co.* v. *United States*, 285 U. S. 240, 245 (involving the meaning of "troops"). Similarly, the continual peacetime use of War Department property for disaster relief purposes, or the then recent connection of the War Department with the Civilian Conservation Corps, essentially a relief agency, may have prompted the inclusion of the cautionary words. The phrase further serves the function of making it clear that land-grant rates are not to be applied to arms or munitions moving for disposal unrelated to a military purpose.

The principle of use has been consistently applied in the administration of the act by the General Accounting Office. Thus, the Comptroller General has refused to seek reduced rates for materials shipped in 1941 for a relief project at a military post, certified by the Secretary of War

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portation Act of 1940, which first presented the exception for military or naval property, omit these words in their careful paraphrase of Section 321 (a). See *supra*, p. 66.

as important for military purposes, on the ground that the act appropriating the funds (Emergency Relief Appropriation Act for fiscal year 1941, 54 Stat. 611) had as its prime purpose "to provide for the relief of the needy" and military considerations were subsidiary. 20 Comp. Gen. 438, 442. Coast Guard property has been ruled entitled to reduced rates if moving for purposes connected with the agency's war-time status as a component of the Navy, but not if intended for normal peacetime operations. 20 Comp. Gen. 822.

The District Court has suggested that this interpretation "would obliterate any distinction between the civilian and the military in time of war" (No. 56, R. 25), especially in this day of "total war". It was feared that all Government property would then move at land-grant rates. But we do not contend that "total war" engulfs all Government operations. The statute expressly limits the reduced tariff, even in wartime, to "military or naval property moving for military or naval and not for civil use." It is true that in time of war, by far the larger share of Government property moves for national defense purposes and this was certainly not beyond the contemplation of Congress. But there still remains a substantial portion devoted to non-military ends. The normal activities of Government continue to function, with their normal "housekeeping" needs; the mail is carried and post offices may be built; the business of the

courts remains for the most part the settlement of normal civilian disputes; prisons continue to house ordinary felons; certain flood-control, reclamation and navigation works are constructed to aid commerce, navigation or agriculture; even some relief projects may be continued (cf. Emergency Relief Appropriation Act, fiscal year 1943, 56 Stat. 634), especially in areas more slowly affected by war prosperity, such as Puerto Rico or the Virgin Islands. Cf. Jt. Res. of June 22, 1943, 57 Stat. 161, 541, 617.

Since we place "military or naval property" in apposition to "moving for military or naval and not for civil use", the rule that effect must be given to every word of a statute will probably be urged against us on this point, as well. But respondents forget that Congress can make its meaning clear by using a few more words rather than too few. In any case, there is no need to enter into a battle of opposing rules of construction, for it is clear that the "dominating general purpose" of a statute may not be frustrated by a reading mechanically pieced together by selected rules of interpretation. *Securities and Exchange Commission* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, 350–1. The dominating general purpose of Section 321 (a), to continue cheap transportation of Government property shipped in aid of the national defense, we have already shown.

3. *Narrower interpretations contravene the obvious legislative purposes.*—The construction

for which we contend finds further support in the reasons which compel rejection of each of three narrower alternative readings of Section 321 (a) which can be urged.[41]

1. One such interpretation is that "military or naval property" consists solely of "arms", "munitions of war", or material "inherently" military by nature (See Point IX of brief of respondent in No. 57 in Circuit Court of Appeals). We shall point out how broadly Congress has interpreted "military equipment" in another national defense statute, the requisitioning act.[42] Here, it may be enough to cite the basic Land-Grant Act of July 16, 1892, 27 Stat. 174, 180 (*supra*, p. 54), and the succeeding Army appropriation acts for over thirty years, in which Congress consistently re-

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[41] In our brief in the companion case, *Northern Pacific Railway Co.* v. *United States*, No. 400, we discuss a fourth narrow interpretation of Section 321 (a), i. e., that only property moving for use by military or naval *personnel* is entitled to land-grant rates.

[42] Under Section 6 of the Act of July 2, 1940, 54 Stat. 712, 714, authorizing export control of "any military equipment or munitions, or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operation thereof" (substantially the same terms as the requisitioning acts of 1940 and 1941, *infra*, p. 102) dresses made of synthetic textiles (*United States* v. *251 Ladies Dresses*, 53 F. Supp. 772 (S. D. Tex.)) and platinum metals (*United States* v. *Rosenberg*, 47 F. Supp. 406 (E. D. N. Y.), 150 F. 2d 788 (C. C. A. 2), certiorari denied, 326 U. S. 752) have been held properly controllable.

ferred to "transportation of troops and *munitions of war and military supplies and property*", thus making it clear, for land-grant purposes, that "military property" can and does include materials other than "munitions of war". Several other statutes have carefully used "munitions" or "arms" when Congress has sought to cover only that limited category of military property.[43] War Department practice has long referred to all of its purchases, of pencils as well as of rifles, as "military supplies". See *Military Laws of the United States,* 8th ed. 1939, and Supp. III, 1939–1944, Sections 1928–1941, 2014–2033. During the war, War Department policy, requiring advantage to be taken of land-grant rates in

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[43] The Joint Resolution of March 14, 1912, 37 Stat. 630, prohibited the export of "*any arms or munitions of war*" to countries in which there was domestic violence. The Neutrality Acts of 1935, 1937, and 1939, all dealt with the exportation of "*arms, ammunition, or implements of war*" to belligerent countries. Jt. Res. of August 31, 1935, c. 837, 49 Stat. 1081; Jt. Res. of May 1, 1937, c. 146, 50 Stat. 121; Jt. Res. of November 4, 1939, c. 2, 54 Stat. 4. The various proclamations issued under these provisions of the Neutrality Acts, since 1935, have not included phosphates. Proc. of April 10, 1936, 49 Stat. 3503; May 1, 1937, 50 Stat. 1834; Proc. of Sept. 5, 1939, 54 Stat. 2629; Proc. of April 9, 1942, 56 Stat. 1948. See for discussions of the term "arms or munitions of war" 29 Op. Atty. Gen. 375; 30 Op. Atty. Gen. 213, 227; 32 Op. Atty. Gen. 132. See also Act of June 25, 1940, c. 427, 54 Stat. 572, 573–4, authorizing R. F. C. to create subsidiary corporations "to purchase and produce equipment, supplies, and machinery, for the manufacture of *arms, ammunition, and implements of war.*"

purchasing, made no distinction whatever between "civilian type" and "military type" goods;[*] the Quartermaster Corps (which purchases clothing, bedding, food, and miscellaneous supplies) applied the same rules as the Ordnance Department. See War Department Procurement Regulations No. 11, par. 1182c, 10 Fed. Reg., sec. 811.1182c. (August 25, 1945, p. 10671.) Furthermore, it is clear that when the War Department proposed to Congress, in 1938, that "military or naval property" continue to be transported at reduced rates, it intended to cover, at the least, all of its own supplies. Hearings on H. R. 10620, 75th Cong., p. 16–17, *supra*, p. 60. Like its near-synonym, "military supplies", the term "military property"—broader in connotation than "military goods" or "military type"—is ample enough to encompass all kinds of supplies intended for military use. Accordingly, raw materials (benzol, lumber), semi-processed goods

[*] It is a mistake to assume that the War and Navy Departments do not purchase "civilian type" goods. Especially in wartime, vast quantities of materials, indistinguishable in character from those used by the general populace, are bought for the official use of the Army and the Navy and the personal use of its members and of the civilians accompanying them. Purchases for Quartermaster stores and commissaries are but a familiar aspect of this practice. For some idea of the myriad types of property procured by the War Department during the war, see War Department Procurement Regulations No. 6, especially Appendix I, partially reprinted in 10 Fed. Reg., sec. 806.603 *et seq.* (August 25, 1945, pp. 10587, *et seq.*).

(copper cable, liquid paving asphalt), and commercial type articles (bowling alley equipment) have been considered by lower courts entitled to the land-grant deduction under Section 321 (a). *Northern Pacific Railway Co.* v. *United States*, now pending on writ of certiorari, No. 400; *Southern Pacific Co.* v. *Defense Supplies Corp.*, 64 F. Supp. 605 (N. D. Calif.).

2. Another interpretation would read the exception for "military or naval property" to apply only to property shipped by or under the control of the War and Navy Departments. Unlike other defense measures adopted contemporaneously,[45] Section 321 (a) employs the broad terms "military or naval property" and nowhere refers to specific agencies or departments of the Government.[46] There was

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[45] See *e. g.* the Emergency Relief Appropriation Act of 1941, 54 Stat. 611, providing for certifications by the Secretary of War or Navy as to military importance; Act of July 2, 1940, 54 Stat. 712.

[46] The history of the Renegotiation Acts presents an interesting example of the repeated amendments which may be required in a war statute expressly limited to named agencies. The first renegotiation act (Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, April 28, 1942, 56 Stat. 245) limited the renegotiation of war contracts to those made by the War Department, the Navy Department, and the Maritime Commission. By the Revenue Act of 1942, October 21, 1942, 56 Stat. 982, the Treasury Department was added. The Military Appropriation Act, 1944, July 1, 1943, 57 Stat. 347, added the Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company. The Revenue

ample reason for the distinction. Section 321 (a) was intended as permanent legislation, and Congress knew full well that the procurement, distribution, or use of supplies necessary for the national defense might become the province of agencies other than the War and Navy Departments. As far back as 1924, Herbert Hoover, then Secretary of Commerce, had recommended to Congress a central civilian purchasing agency for wartime. See H. Doc. 271, 72d Cong., 1st Sess. (Documents by the War Policies Commission) pp. 30–31.[47] In Great Britain, war supplies were being procured, since 1939, by a civilian Ministry of Supply, and in Canada, the function was allotted to a civilian Ministry of Munitions and Supply. On June 25, 1940, Congress itself had authorized the Reconstruction Finance Corporation to create subsidiary corporations with power, among other things, "to purchase and produce equipment, supplies, and machinery, for the manufacture of arms, ammunition, and implements of war." Act of June 25, 1940, c. 427, 54 Stat. 572, 573–4.[48] It was

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Act of 1943, February 25, 1944, 58 Stat. 78, added the War Shipping Administration. It may be suggested that if section 321 (a) of the Transportation Act of 1940 had named specific agencies, Congress might have been called upon progressively to amend it, as had to be done in the case of the Renegotiation Act.

[47] In 1918, Mr. Justice Brandeis had made a similar suggestion. See Mason, *Brandeis* (1946), pp. 523–4.

[48] This Act was amended, in 1941, to enable these corporations to purchase or produce any supply or article necessary for the national defense or war effort. Act of June 10, 1941, c. 190, 55 Stat. 248, 249.

under this Act, and its amendment, that there were organized Defense Supplies Corporation, Defense Plant Corporation, Metals Reserve Corporation, and the other R. F. C. subsidiaries, which played so vigorous a role in the supply of war materials. The Court will recall the further demands, from many quarters during the war, for centralization of all war procurement, as well as production supervision, in some such civilian agency as the War Production Board. Even those who would not go this far recognized that many types of essential war supplies might better be purchased and handled by units other than the Army and the Navy. Procurement by the Maritime Commission of cargo and transport vessels is perhaps the foremost example. The Office of Strategic Services is another instance, as is the recently created civilian Atomic Energy Commission."[49]

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[49] It is by no means unusual for administration of statutes dealing expressly with the procurement of "military" supplies or "war material" to be vested, in whole or in part, in civilian agencies. For instance, the Secretaries of the Treasury and of Agriculture, and the R. F. C. are authorized to make "emergency purchases of war material abroad", Exec. Order No. 9177, May 30, 1942, 50 U. S. C. App., Supp. V, following sec. 601. Power to requisition certain "military" materials under the Acts of October 10, 1940, and October 16, 1941, as amended, 50 U. S. C. App., Supp. V, 711–724 has been vested in the Secretary of Agriculture (Exec. Order No. 9280, December 5, 1942, 50 U. S. C. App., Supp. V, following Sec. 601), War Food Administrator (Exec. Order No. 9322, March 26, 1943, as amended, 50 U. S. C. App., Supp.

This feeling was current in 1940, and Congress wisely forbore from restricting the continued application of land-grant rates to property under the control of the War and Navy Departments. Members of Congress debating the Act of December 12, 1945, repealing all statutory reduced rates, assumed that the 1940 Act applied to shipments by the Treasury Department, Maritime Commission, Agriculture Department, and War Food Administration (see 91 Cong. Rec. 4183–4201, 10140, cf. H. Rep. No. 393, 79th Cong., pp. 4–5); and the vice-president of the Association of American Railroads publicly took the position that the 1940 Act can apply to agencies other than the War and Navy Departments. Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 78th Cong., 2d Sess., on H. R. 4184, p. 115–6.[50]

3. A related reading, equally unacceptable, would confine the property covered by the reservation in Section 324 (a) to that destined for

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V, following Sec. 601), the War Production Board (Exec. Order No. 8942, November 19, 1941, Exec. Order No. 9024, January 16, 1942; Exec. Order 9040, January 24, 1942, 3 CFR Cum. Supp. pp. 1024, 1079, 1082), and the Economic Defense Board (Exec. Order No. 8900, September 15, 1941, 3 CFR Cum. Supp., p. 1009).

[50] The one court which has expressly discussed the point did not hesitate to apply the statute to shipments by another governmental agency. *Southern Pacific Co.* v. *Defense Supplies Corp.*, 64 F. Supp. 605, 607 (N. D. Calif.) (shipment of benzol by Defense Supplies Corp.)

ultimate use by or under the supervision of armed forces, regardless of the purchasing agency.[51] The difficulty with this interpretation is that it blinds itself to the integral character of modern defense, and assumes the unimportance of the many services and functions essential to or directly supporting an army's operations. The work of armies is, of course, of primary impor-

[51] Judge Hutcheson in the District Court (No. 56, R. 23) agreed that ultimate use by the armed forces of an ally would be sufficient, and that use by American armed forces would not be required. The Court of Claims has also recently held that use by allied armed forces complies with the statute. *Southern Pacific Co.* v. *United States*, Ct. of Claims, Nos. 45952 and 46012, decided October 7, 1946 (automobiles, lend-leased for use in Chinese Army). The Court of Claims stated:

"* * * The United States Government, acting in its sovereign capacity, chose the method it would pursue in the defense of the country, and that defense was inherently military in its nature, in the face of an aggressive, potential enemy. It matters not that it was defense as distinguished from offense. Furnishing of military equipment for the use of the Chinese Army, under the Lend-Lease program, was a sovereign act based on military considerations, and if the same object, the defense of the country, could be obtained by supplying the Chinese Army with military equipment as by supplying it to the Army at home, there is no distinction to be made in the nature of the transportation under the land-grant acts."

In the court below, respondent in No. 56 reserved the point, since its position was that the phosphates were moving for civil and agricultural, and not for military, use in Great Britain, and the Circuit Court of Appeals so held (R. 32). Here, we assume that use by allied armed forces would be admitted to be a military or naval use, for the purposes of Section 321 (a).

tance in wartime, but, to repeat a relevant truism, war of today is fought not only by armies and navies, but on production, economic, political and propaganda fronts. "Economic warfare", a contradiction in terms a century ago, is today a commonplace. As Mr. Bernard M. Baruch, Chairman of the War Industries Board of World War I, told the War Policies Commission, in 1931:

> What it really means is that in the next major conflict the entire population must suddenly cease to be a congeries of individuals, each following a self-appointed course, and become a vast unitary mechanism, composed, in our case, of some 125,000,000 corelated moving parts all working to the end of directing practically all our material resources to the single purpose of victory. Modern war requires that the full power of the Nation be exerted in the shortest possible time not only to the violent beating down of the enemy by any destructive material force we can invent or use, but also to every process of slow and often insidious economic strangulation and political isolation that we can devise and administer.
>
> The battlefield effort (while now only a part of what we shall be called upon to do) has become of itself a monstrous thing. Twentieth century means of transportation, communication, and supply have made possible—and therefore necessary—the massing of men in numbers never before deemed possible. The accelerating progress of

science has created destructive forces which require for their use or for defense against them the products of practically the whole of industry in quantities many times those required for the uses of peace. Thus war requires that, at the very moment when productive effort is deprived of millions of men for military service, the country's facilities for production must be speeded up to disgorge unprecedented volumes of supplies. Civilian morale becomes as important as military morale, and it is necessary to make this cosmic change with the least practicable interference with the normal life of the Nation. Furthermore, the increasing dependence of each principal nation on uninterrupted contacts with practically all other nations entails the necessity—for both offense and defense—of an economic strategy and an intense economic tactics which must include practically every other nation—hostile or neutral—in its far-flung application. [H. Doc. No. 163, 72d Cong., 1st Sess. (War Policies Commission Report) at pp. 31–32, reprinted in Baruch, *American Industry in the War* (1941), pp. 378–9.][52]

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[52] The progressive integration of wartime national economies, and the expanding demands of modern war, exerted such irresistible pressure on the old distinction, in the law of contraband, between the "absolute" and "conditional" categories, that in the war of 1914–1918 all the major belligerents held all commodities essential to the enemy's war effort to be absolute contraband (Turlington, 3 *Neutrality, The World War Period*, pp. 8 *et seq.*, 149: 7 Hackworth,

Similarly, this Court has recently referred, in another connection, to the total effort demanded by "total war in its modern form":

> The bearing of arms, important as it is, is not the only way in which our institutions may be supported and defended, even in times of great peril. Total war in its modern form dramatizes as never before the great cooperative effort necessary for victory. The nuclear physicists who developed the atomic bomb, the worker at his lathe, the seaman on cargo vessels, construction battalions, nurses, engineers, litter bearers, doctors, chaplains—these, too, made essential contributions. [*Girouard* v. *United States*, No. 572, Oct. Term, 1945, decided April 22, 1946.]

We have already noted the breadth of congressional interest in national defense during the year 1940 (*supra*, pp. 67–70), and the scope of later war and defense statutes is well known. And, at least since 1930, Congress has been concerned with the needs of total mobilization. The War Policies Commission made studies under its direction (H. Docs. No. 163, 271, 72d Cong., 1st Sess.) and the Special Senate Committee on Investiga-

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Digest of International Law, pp. 15–29, 17). Prior to World War II, even ardent proponents of the rights of neutrals did not contest the indefinite extension of contraband lists, but sought to protect neutral commerce by suggesting quota, embargo, certificate, and other such devices. *Research in International Law* (1939), 33 Am. J. Int. Law Supp., pp. 487 *et seq.*; Jessup, 4 *Neutrality, Today and Tomorrow*, Chap. VI.

tion of the Munitions Industry of the 73rd Congress continued these investigations. (See S. Rep. No. 944, 74th Cong., 2d Sess., especially Part 4). Specifically, the course of congressional action provides legislative recognition both of (a) the place of civilian agencies in the military defense of the country and (b) the fact that all types of material and supplies needed for the national defense may properly be designated as of "military" or "naval" value.

(a) The Maritime Commission is an outstanding example of a civilian agency which has always been regarded as directly concerned with the defense of the country and the prosecution of war. Article on Merchant Marine, 10 Encyclopedia of the Social Sciences, p. 343; Anderson, *The Merchant Marine and World Frontiers* (1945), p. 140, 1942–3. "An Army and Navy cannot live and fight in foreign lands and waters without a merchant fleet in support * * *". Record, p. 47, *Northern Pacific Railway Co.* v. *United States,* pending on writ of certiorari, No. 400. This is the view of Congress, as its legislation makes plain. In the Declaration of Policy of the Merchant Marine Act, 1936, 49 Stat. 1985, 46 U. S. C. 1101, the national defense takes priority over the development of commerce; ship designs must be submitted to the Navy Department "in order that such vessel shall be suitable for economical and speedy conversion into a naval or military auxiliary, or

otherwise suitable for the use of the United States Government in time of war or national emergency," Merchant Marine Act, 1936, Sec. 501 (b), 46 U. S. C. 1151 (b); and in time of "national emergency" or when the "security of the national defense" makes it advisable, the Commission is empowered to requisition or purchase merchant marine vessels, Merchant Marine Act, 1936, Sec. 902, 46 U. S. C. 1242. During the national defense and war periods, the Commission procured cargo and transport vessels of all kinds, some of which were later turned over to the Army or Navy, and others carried essential war supplies to our allies and our troops overseas. Its importance as a war procurement agency was so obvious that Congress included it without question in the first Renegotiation Act (Sixth Supplemental National Defense Appropriation Act, April 28, 1942, 56 Stat. 245). Congress surely did not intend to exclude material shipped for war vessels under construction for the Maritime Commission from the benefits of reduced rates. Cf. *Northern Pacific Railway Co.* v. *United States, supra* (copper cable shipped for Maritime Commission vessels).

Other instances combine to prove the unreality of limiting the exception in Section 321 (a) to property destined for use by armies, or under army control. The Board of Economic Warfare and the Foreign Economic Administration

engaged in large programs of preclusive buying in neutral countries, not only to obtain strategic or essential materials for ourselves, but also in large part simply to prevent the enemy from acquiring them. Spiegel, *The Economics of Total War* (1942), pp. 51, 295. The Procurement Division of the Treasury Department purchases materials determined by the Secretary of War and the Navy to be strategic and critical, and stockpiles them for use in times of national emergency. Act of June 7, 1939, c. 190, 53 Stat. 811, 50 U. S. C. 98 *et seq.* The Office of War Information ceaselessly conducted propaganda against the enemy's army and home population by radio and pamphlet. The War Shipping Administration directed the repair of the fleet of merchant marine vessels which transported the endless stream of supplies to all theaters of the war. The Selective Service System recruited the civilians who were to make up the Army, the Navy, and the Marine Corps. These were all "civilian" agencies, and their operations, though coordinated with the Army and Navy, were independently carried on. But it cannot be doubted that their war work had the direct and immediate aim of causing the Axis armies to collapse. Such a hostile purpose can hardly be called "civil";[33] there is no difficulty in calling it "military."

[33] "*Pertaining to a citizen in regard to ordinary affairs:* opposed to ecclesiastical or military," [italics supplied] ac-

(b) Congress has likewise shown its understanding that terms such as "military or naval equipment" or "war material" do not, under the conditions of modern war, exclude anything that is necessary for the national defense. The Senate report on the proposed property requisitioning bill (Act of October 16, 1941, 55 Stat. 742, 50 U. S. C. App., Supp. V, 721–724) states that the statutory language[54] was "sufficiently broad to cover generally any property which may be necessary in the preparation of our military and naval defense, without attempting the impossible task of naming the exact articles or materials; and yet sufficiently limited so that it does not include property having no connection with military or naval defense" (S. Rep. 565, 77th Cong., 1st Sess., p. 2). On the Senate floor, Senator Chandler, in charge of the bill, repeatedly emphasized that the statutory terms were "broad enough to cover everything that is necessary to defend the United States" 87 Cong. Rec. 6160. In response to a query whether "any military or naval equipment" was used in a technical sense rather than to include all articles of military or naval value, the Sen-

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cording to Funk and Wagnalls Dictionary of the English language, quoted by Judge Hutcheson in the District Court (No. 56, R. 26).

[54] "any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions."

ator emphatically denied there was any distinction:

> It presupposes that in order to defend the United States the President will find it necessary to obtain the use of any military or naval equipment, or supplies, or anything that is necessary to defend the people of the United States. I will ask again: 'What more are we going to do than to find that the proposed action is necessary; that a delay might invite disaster; and to say that he has exhausted every other means in trying to find a way out, or trying to make arrangements with some persons who can furnish such materials to the Government. [87 Cong. Rec. 6164, July 21, 1941; see also 87 Cong. Rec. 6159 and 6163.]

Again, in providing in 1918 and 1940 for the punishment of the wilful destruction of "war material" and "national defense material", Congress broadly defined these terms to include "arms, armament, ammunition, livestock, stores of clothing, food, foodstuffs, or fuel" and "supplies, munitions, and all other articles of whatever description, and any part or ingredient thereof" intended for war or national defense use. Act of April 20, 1918, 40 Stat. 533, and Act of November 30, 1940, 54 Stat. 1220, 50 U. S. C. 101–106.

4. *Section 321 (a) must be construed in favor of the Government rather than of the railroads.*— We believe that the foregoing arguments for accepting the broad reading of the exception in

Section 321 (a), and for rejecting all narrower alternatives, are conclusive. Any doubt, however, should be resolved by the established rule that grants of public property and relinquishments of public interests or privileges are to be liberally construed in favor of the Government and strictly against the donee. *Southern Pacific Co.* v. *United States,* 307 U. S. 393, 401; *Great Northern Ry. Co.* v. *United States,* 315 U. S. 262, 272; *Southern Ry Co.* v. *United States,* 322 U. S. 72, 76. "It is also a familiar rule of construction that where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, and there is doubt as to the meaning of its terms, or as to its general purpose, that construction should be adopted which will support the claim of the government rather than that of the individual." *Slidell* v. *Grandjean,* 111 U. S. 412, 437.

This rule applied with full effect to the original all-embracing reduced rate conditions of the grant, as embodied in the Act of June 7, 1924 (*Southern Pacific Co.* v. *United States, supra; Southern Ry. Co.* v. *United States, supra*), but respondents seem to claim that the Government's partial release of its public rights somehow turns the scales wholly in the railroads' favor. In the lower court, the argument appeared to be threefold: first, that the Transportation Act of 1940 and Section 321 (a) constitute "remedial" legislation and "excep-

tions" from their scope must be narrowly construed; secondly, that Section 321 (b) provides full "consideration" for the Government's rate concession and negatives the application of the rule; and, finally, that the exception for "military or naval property" is for the Government's benefit and must, therefore, be construed against the Government. Each of these curious arguments is fallacious.

1. The first misuses the wholesome doctrine that broad regulatory measures correcting a previous mischief are "remedial", and exceptions from the sweep of the regulatory power should therefore be narrowly limited. Obviously, this rule has not the slightest application to a non-regulatory statutory "exception" retaining for the Government an important economic privilege of great value. Nor should Section 321, which was tacked onto an omnibus transportation measure mainly overhauling the Interstate Commerce Act, be construed as in *pari materia* with the regulatory sections of the Act. Cf. *United States* v. *Colorado & N. W. R. Co.*, 157 Fed. 321, 330 (C. C. A. 8) certiorari denied, 209 U. S. 544. Neither can Section 321, in itself be read as solely concerned with relief of the railroads. The policy of the provision flows as much from the "exception" as from the body of the section. The desire of Congress was to continue land-grant rates for national defense, but not for other

Governmental purposes. As our survey of the legislative history suggests, it may well have been an accident of draftsmanship and of the legislative course of the statute that Section 321 cast its provision concerning "military or naval property" in the form of an exception rather than as main text.

2. Respondents' second argument stresses Section 321 (b), requiring a release of all claims to *unpatented* lands as a condition precedent to the effectiveness of Section 321 (a). The legislative history indicates that Subsection (b) was inserted, over the protests of the railroads, at the urging of various Government agencies, particularly the Department of the Interior, which wholly opposed repeal of the land-grant statutes but felt that, at the very least, the roads should at last put an end to their unresolved public land claims. Hearings before a Subcommittee of the Senate Committee on Interstate Commerce, 76th Cong., 1st Sess., on S. 1915, S. 1990 and S. 2294, pp. 5, 57–63, 64–5, 97, 164–5. This action by the carriers was nowhere regarded as adequate "consideration" for abolition, whole or partial, of the reduced rates. Rather, the releases were "given in pursuance of an apparent Congressional purpose to wipe the slate clean of such claims by any railroad which enjoyed the benefits of the rate concessions made by the Transportation Act of 1940." *Santa Fe Pacific R. Co.* v. *Ickes*, 57 F. Supp. 984, 987

(D. D. C.) reversed on other grounds, 153 F. 2d 305 (App. D. C.) now pending on certiorari Nos. 97 and 98, this Term. Moreover, adequate "consideration" or not, respondents' argument runs full tilt against the judicial history of land-grant rates. The railroads' original obligation to haul Government property at reduced charges was "consideration", in exactly the same sense, for the initial nineteenth century land-grants (*Burke* v. *Southern Pacific Railroad Company*, 234 U. S. 669, 679; *Louisville & Nashville Railroad Company* v. *United States*, 267 U. S. 395, 402), but the Court has not hesitated to apply the general rule favoring the Government. See cases cited *supra*, p. 101. Section 321 (a) stands on no higher footing.

3. The third argument seeks to avoid present application of the rule by bottoming it solely on the familiar explanation that public grants are usually drawn by the interested donee who will presumably protect his own interests. That reason is thought to be absent here,[55] and the rule itself therefore without application. But the reasons for the rule are obviously broader than respondents' claim. History teaches that the ut-

[55] It is clear that from 1938 to 1946 the Association of American Railroads continuously and actively urged, before Congress and its committees, the repeal of land-grant rates; but we are unable to say whether or not its representatives actually participated in the drafting of the exception in Section 321 (a), or approved that wording.

most vigilance is necessary to conserve and protect public property, public land, public rights. As this Court said in *Southern Ry. Co.* v. *United States*, 322 U. S. 72, 76, the latest land-grant rate case: "The records show that the privilege of obtaining the benefit of rates on land-grant routes is a valuable privilege indeed. We cannot assume that the United States intended to surrender any of those benefits * * * unless the purpose to do so was plainly expressed."

CONCLUSION

For the reasons stated, we respectfully submit that the judgments below are erroneous and should be reversed.

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DECEMBER 1946.

APPENDIX

The Transportation Act of September 18, 1940, 54 Stat. 898, 49 U. S. C. 65 (a), *et seq.*, provides, in part, as follows:

PART II—RATES ON GOVERNMENT TRAFFIC

Government to Pay Full Rates

SEC. 321. (a) Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty; * * *

(b) If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such trans-

portation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law.

Deduction of Overpayments

SEC. 322. Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall

be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

The Lend-Lease Act (Act of March 11, 1941), 55 Stat. 31, 22 U. S. C. 411–419, provides, in part, as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as "An Act to Promote the Defense of the United States".

SEC. 2. As used in this Act—

(a) The term "defense article" means—

(1) Any weapon, munition, aircraft, vessel, or boat;

(2) Any machinery, facility, tool, material, or supply necessary for the manufacture, production, processing, repair, servicing, or operation of any article described in this subsection;

(3) Any component material or part of or equipment for any article described in this subsection;

(4) Any agricultural, industrial or other commodity or article for defense.

Such term "defense article" includes any article described in this subsection: Manufactured or procured pursuant to section 3, or to which the United States or any foreign government has or hereafter acquires title, possession, or control.

(b) The term "defense information" means any plan, specification, design, pro-

totype, or information pertaining to any defense article.

SEC. 3. (a) Notwithstanding the provisions of any other law, the President may, from time to time, when he deems it in the interest of national defense, authorize the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government—

(1) To manufacture in arsenals, factories, and shipyards under their jurisdiction, or otherwise procure, to the extent to which funds are made available therefor, or contracts are authorized from time to time by the Congress, or both, any defense article for the government of any country whose defense the President deems vital to the defense of the United States.

(2) To sell, transfer title to, exchange, lease, lend, or otherwise dispose of, to any such government any defense article, but no defense article not manufactured or procured under paragraph (1) shall in any way be disposed of under this paragraph, except after consultation with the Chief of Staff of the Army or the Chief of Naval Operations of the Navy, or both. The value of defense articles disposed of in any way under authority of this paragraph, and procured from funds heretofore appropriated, shall not exceed $1,300,000,000. The value of such defense articles shall be determined by the head of the department or agency concerned or such other department, agency or officer as shall be designated in the manner provided in the rules and regulations issued hereunder. Defense articles procured from funds hereafter appropriated to any department or agency of the Government, other than from funds authorized

to be appropriated under this Act, shall not be disposed of in any way under authority of this paragraph except to the extent hereafter authorized by the Congress in the Acts appropriating such funds or otherwise.

(3) To test, inspect, prove, repair, outfit, recondition, or otherwise to place in good working order, to the extent to which funds are made available therefor, or contracts are authorized from time to time by the Congress, or both, any defense article for any such government, or to procure any or all such services by private contract.

(4) To communicate to any such government any defense information, pertaining to any defense article furnished to such government under paragraph (2) of this subsection.

(5) To release for export any defense article disposed of in any way under this subsection to any such government.

(b) The terms and conditions upon which any such foreign government receives any aid authorized under subsection (a) shall be those which the President deems satisfactory, and the benefit to the United States may be payment or repayment in kind or property, or any other direct or indirect benefit which the President deems satisfactory.

(c) After June 30, 1943, or after the passage of a concurrent resolution by the two Houses before June 30, 1943, which declares that the powers conferred by or pursuant to subsection (a) are no longer necessary to promote the defense of the United States, neither the President nor the head of any department or agency shall exercise any of the powers conferred by or pursuant

to subsection (a); except that until July 1, 1946, any of such powers may be exercised to the extent necessary to carry out a contract or agreement with such a foreign government made before July 1, 1943, or before the passage of such concurrent resolution, whichever is the earlier.

(d) Nothing in this Act shall be construed to authorize or to permit the authorization of convoying vessels by naval vessels of the United States.

(e) Nothing in this Act shall be construed to authorize or to permit the authorization of the entry of any American vessel into a combat area in violation of section 3 of the Neutrality Act of 1939.

* * * * * *

SEC. 8. The Secretaries of War and of the Navy are hereby authorized to purchase or otherwise acquire arms, ammunition, and implements of war produced within the jurisdiction of any country to which section 3 is applicable, whenever the President deems such purchase or acquisition to be necessary in the interests of the defense of the United States.

SEC. 9. The President may, from time to time, promulgate such rules and regulations as may be necessary and proper to carry out any of the provisions of this Act; and he may exercise any power or authority conferred on him by this Act through such department, agency, or officer as he shall direct.

SEC. 10. Nothing in this Act shall be construed to change existing law relating to the use of the land and naval forces of the United States, except insofar as such use relates to the manufacture, procurement,

and repair of defense articles, the communication of information and other noncombatant purposes enumerated in this Act.

The act of December 12, 1945, c. 573, 59 Stat. 606, provides:

* * * That subsection (a) of section 321 of title III, part II, of the Transportation Act of 1940, be, and the same is hereby, amended by striking out the following: "except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or property of such members) when such members are traveling on official duty;" so that said subsection, as so amended, shall read as follows:

"SEC. 321. (a) Notwithstanding any other provision of law, but subject to the provisions of section 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, and the rate determined by the Interstate Commerce Commission as reasonable therefor shall be paid for the transportation by railroad of the United States mail: *Provided, however,* That any carrier by railroad and the United States may enter into contracts for the transportation of the United States mail for less than such rate: *Provided further,* That section 3709, Revised Statutes (U. S. C., 1934 edition, title 41, sec. 5), shall not hereafter be construed as re-

quiring advertising for bids in connection with the procurement of transportation services when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed."

SEC. 2. The amendment made by section 1 of this Act shall take effect October 1, 1946: *Provided however,* That any travel or transportation specifically contracted for prior to such effective date shall be paid for at the rate, fare or charge in effect at the time of entering into such contract of carriage or shipment.

SEC. 3. The Interstate Commerce Commission, in the exercise of its power to prescribe just and reasonable rates, fares, and charges, shall give due consideration to the increased revenues which carriers will receive as a result of the enactment of this Act, so that such increased revenues will be reflected in appropriate readjustments in rates, fares, and charges to shippers.

U. S. GOVERNMENT PRINTING OFFICE 1946

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

NO. 56

UNITED STATES, *Petitioner*,

v.

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY, *Respondents*

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS

W. R. C. COCKE,
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E. S. SARGEANT,
Counsel for Respondents.

Norfolk, Va.,
December 27, 1946.

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In The

Supreme Court of the United States

October Term, 1946

No. 56

UNITED STATES OF AMERICA, *Petitioner*

v.

LEGH R. POWELL, JR., and HENRY W. ANDERSON, as Receivers of the Properties and Assets of Seaboard Air Line Railway Company, *Respondents.*

BRIEF ON BEHALF OF RESPONDENTS

I.

JURISDICTION

The jurisdiction of this Court is invoked by Petitioner under the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (Petitioner's Brief, p. 2).

II.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Virginia, Norfolk Division (R. 18), in the instant case, is reported in 60 F. Supp. 433. The opinion of the Circuit Court of Appeals (R. 30) is reported in 152 F. (2d) 228.

United States v. *Atlantic Coast Line Railroad Company* (No. 57), now pending and set for argument in this Court following the instant case, is substantially identical with it. The opinion of the District Court for the Eastern District of Virginia, Richmond Division, in that case is not reported. In effect it adopted the

opinion of the District Court in the instant case. The opinion of the Circuit Court of Appeals in the *Atlantic Coast Line* case is reported in 152 F. (2d) 230.

III.

SUMMARY STATEMENT OF THE ISSUE AND THE POSITION OF RESPONDENTS

In August, 1941, fifty-six (56) carloads of phosphate rock and twenty-two (22) carloads of superphosphate, property of the United States, were transported over the respondents' railroad (hereinafter called "the Seaboard"), consigned to the British Ministry of War Transport for export to England under the lend-lease program, Act of March 11, 1941, Public No. 11 (55 Stat. 31) and Act of March 27, 1941, Public No. 23 (55 Stat. 53). The issue presented is whether or not these shipments were entitled to move subject to so-called land-grant deductions from the full commercial rates, under the provisions of Section 321(a) of the Transportation Act of 1940, 54 Stat. 898, 954, U. S. Code, Title 49, Section 65(a).

Section 321(a), so far as pertinent here, reads:

> "Notwithstanding any other provision of law. * * * the full applicable commercial rates * * * shall be paid for transportation by any common carrier subject to the Act of any * * * property for the United States or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use * * *."

This statute effected the abolition, subject to the exception stated, of so-called land-grant rates, which were charges substantially less than the full commercial rates. Prior to the enactment of Section 321(a), the reduced land-grant rates were required to be accorded the United States in respect of the transportation of all government property in consideration of early governmental grants of public lands to sundry railroads. We shall have occasion at a later point in this brief to outline the history of land-grant rates and discuss the considerations which led to their abolition (*post*, pp. 28-41).

The case turns upon the question whether or not the shipments were at the time of their transportation by the Seaboard "military or naval property of the United States moving for military or naval and not for civil use," within the meaning of the exception contained in Section 321(a).*

As to the intended and actual use in Great Britain of both the phosphate rock and the superphosphate, the facts are stipulated (R. 15-16), as follows:-

> "In 1941, at the times the requisitions for the materials involved in the counterclaim were made, approved and authorized, and the shipments moved, there was a serious food situation in Great Britain, by virtue of the fact that Great Britain, normally a heavy food importing nation, was cut off from many sources of supply. Imports were further restricted by shortage of shipping. Great Britain therefore found it necessary to revise her agricultural practices in order to intensify production of food for direct human consumption. It was necessary to put into production a large acreage of land normally not used for the production of food for direct human consumption, and phosphate fertilizers had to be imported and distributed to effectuate this revised agricultural program. The shipments of phosphate rock and superphosphate comprised a part of that program. Great Britain instituted controls which resulted in the proper use and distribution of said materials to accomplish this purpose, for which they were requisitioned and authorized under the Lend-Lease Act."

Further as to the character of the shipments and their intended and actual use, it appears that the specification in the contract covering the purchase of the superphosphate (Exhibit 7; R. 8, 10) called for "concentrated phosphatic fertilizer" and required that it be "properly cured" and "delivered in such physical condition as will permit its use by the farmer in the usual fertilizer distributing methods."

It is thus established that the shipments constituted agricultural property moving for agricultural use. In common understanding,

* Hereinafter the terms "military property" and "military use" are used as inclusive of both military and naval property and use.

agriculture ranks among those occupations farthest removed from the belligerent callings. As to the shipments here involved, therefore, the question is whether the bare circumstance that these materials moved for export under the lend-lease program is enough to override proof of intended use as agricultural fertilizer and constitute phosphate rock and superphosphate military property moving for military and not for civil use. Differently stated, the ultimate issue is whether all lend-lease material, regardless of its inherent character, its properties, or its intended and actual use, is to be regarded as *ipso facto* military property moving for military and not for civil use. (Cf. Petitioner's 4th and 5th assignments of error, Petn. for Certiorari, p 6, and Petitioner's Brief, pp. 18, 44, 102.)

It is the position of respondents (1) that the Lend-Lease Act contemplated and provided for export of not only military property moving for military use but also civilian property moving for civil and not for military use; (2) that this is established by the language of the Act itself and by the practical construction uniformly applied in its execution and repeatedly approved by Congress; and (3) that therefore the circumstance that the shipments here involved moved for export under the lend-lease program does not establish, or even indicate, that the material transported was military property moving for military and not for civil use, within the meaning of the exception contained in Section 321(a) of the Transportation Act of 1940.

We shall proceed at once to argument in support of this position. In doing so we present our answer to the proposition upon which, in our view, Petitioner's case must necessarily rest, namely, that lend-lease material is, merely by virtue of being lend-lease, and without regard to the inherent nature of the material or the character of its intended and actual use, military property moving for military and not for civil use.

IV.

ARGUMENT

The Lend-Lease Act, entitled "An Act to Promote the Defense of the United States," became law on March 11, 1941. The United States was then at peace. But France had fallen, the power of Germany was at its peak, and England stood alone. The gravity of the consequent threat to the Western Hemisphere, including the United States, was recognized as an impelling cause for all defensive measures short of war. Lend-lease was the most conspicuous measure then adopted. A copy of the Act appears in Appendix A to this brief (p. 50). Both on its face, and under consistent practical construction repeatedly approved and adopted by Congress, the Act contemplated and, among other things, provided for exportation of civilian property moving for civil and not for military use.

The Act authorized the President, when he deemed it in the interest of national defense, to sell, transfer title to, exchange, lease, lend, or otherwise dispose of, to any country whose defense he deemed vital to the defense of the United States, any "defense article," as that term was defined in the Act. By subsection (a) of Section 2 of the Act, "defense article" was defined as including:

> "(1) Any weapon, munition, aircraft, vessel, or boat;
>
> "(2) Any machinery, facility, tool, material, or supply necessary for the manufacture, production, processing, repair, servicing, or operation of any article described in this subsection;
>
> "(3) Any component material or part of or equipment for any article described in this subsection;
>
> "(4) Any agricultural, industrial or other commodity or article for defense."

The terms and conditions upon which any foreign government was to receive lend-lease aid under the Act "shall be those which the President deems satisfactory, and the benefit to the United States may be payment or repayment in kind or property, or any other direct or indirect benefit which the President deems satisfactory."

Such, in essence, was the Lend-Lease Act. It carried no appropriation, but for its initial execution, on March 27, 1941, the first of a series of Appropriation Acts became law (Pub. No. 23, 77th Cong., 1st Session). It appropriated:

> "(a) For the procurement, by manufacture or otherwise, of defense articles for the government of any country whose defense the President deems vital to the defense of the United States, including services and expenses in connection therewith, as follows:
>
> "(1) Ordnance and ordnance stores, supplies, spare parts, and materials, including armor and ammunition and components thereof, $1,343,000,000.
>
> "(2) Aircraft and aeronautical material, including engines, spare parts, and accessories, $2,054,000,000.
>
> "(3) Tanks, armored cars, automobiles, trucks, and other automotive vehicles, spare parts, and accessories, $362,000,000.
>
> "(4) Vessels, ships, boats and other watercraft, and equipage, supplies, materials, spare parts, and accessories, $629,000,000.
>
> "(5) Miscellaneous military equipment, supplies and materials, $260,000,000.
>
> "(6) Facilities and equipment, for the manufacture or production of defense articles, by construction or acquisition, including the acquisition of land, and the maintenance and operation of such facilities and equipment, $752,000,000.
>
> "(7) Agricultural, industrial, and other commodities and articles, $1,350,000,000."

By Section 5(b) of the Lend-Lease Act, the President was required from time to time, but not less frequently than once every ninety days, to report to Congress operations under the Act. These reports were made accordingly. They are germane to the issue and will be discussed in some detail hereinafter. They supplied, in part at least, the information upon which Congress repeatedly appropriated prodigious sums for prosecution of the lend-lease program. It was stipulated that these reports might be referred to without objection and without their formal introduction in evidence. (R. 16, 36)

1. The Lend-Lease Act, on Its Face, Provided for Aid in Terms of Civilian Property Destined for Civil Use as Well as Military Property Destined for Military and Not for Civil Use.

That the Lend-Lease Act did not confine aid to countries whose defense the President deemed vital to the defense of the United States to military property destined for military and not for civil use becomes apparent upon careful consideration of the definition of "defense articles" contained in the Act. That definition was plainly designed to include, and by its language it did include, the whole vast category of articles and commodities required for the prosecution of "total war," as we have come to know it.

War in our time, as everyone knows, is no mere combat at arms between contesting military and naval forces. Successful prosecution of modern war requires mobilization, and dedication to the war effort, of civilian and military personnel alike. The entire economy of belligerent nations must be devoted to prosecution of the war. The "home front" attains an importance equal to that of the "fighting front." War today is a contest in industrial production, agriculture and transportation as truly as it is a contest at arms.

Despite Petitioner's argument to contrary, total war has served to emphasize, rather than to obscure, the distinction between what, in common understanding, is military or naval on the one hand, and civilian on the other. Industrial and agricultural occupations are recognized as emphatically civilian, non-military and non-naval occupations. The very emphasis placed upon their essentiality to the war effort, reflected in deferment or exemption from military service of key men in industry and agriculture, underscores the continuing distinction in war, as in peace, between what is civilian and what is military or naval.

Clearly, effective aid through lend-lease to countries whose successful prosecution of modern war was deemed vital to our own defense must comprise aid commensurate with the scope of present-day war effort. The whole economy of the country we would sustain in its prosecution of war must be buttressed. Aid

limited to the supply of military property for use by the fighting forces would fall far short of "all out" assistance. Aid in the production of arms, munitions and food was equally essential. This was fully recognized in the definition of "defense articles" contained in the Act. That definition comprised civilian as well as military equipment and supplies.

Under the definition, the President might supply to a foreign country as lend-lease aid, not only "any weapon, munition, aircraft, vessel, or boat,"—which were covered by item (1) and may be taken as military or naval in character,—but also, under item (2), "any machinery, facility, tool, material, or supply necessary for the manufacture, production, processing, repair, servicing, or operation" of any weapon, munition, aircraft, vessel or boat. The whole range of equipment necessary for the manufacture, construction and production of weapons, munitions, airplanes and watercraft was thus brought within the scope of lend-lease. Certainly, a machine tool in the hands of a civilian worker in a munitions factory in the environs of London was no more military property for military use than was a similar tool in the hands of a worker in a munitions factory in Detroit. It would have been fanciful to describe industrial workers as soldiers or sailors and their machinery and tools as military property.

But the definition of "defense article" yet more clearly shows that aid in terms of civilian goods for civil use was contemplated and provided for. Item (2) comprised any machinery, facility, tool, material, or supply necessary for the manufacture, production, processing, repair, servicing, or operation "of any article described in this subsection." It is thus clear that any tool or equipment useful in the manufacture or production of any tool or equipment useful in the manufacture or production of any weapon, munition, aircraft, vessel or boat, was within the scope of lend-lease, and so on *ad infinitum*. It was like the house that Jack built. And designedly and quite reasonably so. For the whole gamut of industrial production was essential to total war. But industrial production was distinctly a civilian contribution to the war effort, and industrial equipment was civilian property devoted to a civil and not a military use.

As has been noted, the definition of "defense article" included, in item (2), any "supply necessary for the manufacture, production, processing, repair, servicing, or operation of any article described in this subsection." Among the articles of supply vital to production of weapons, munitions, aircraft, vessels and boats and to production of machinery, facilities, tools, materials and supplies necessary for the production of weapons, munitions, aircraft, vessels and boats, was food. When the Lend-Lease Act became law submarine warfare threatened to starve England into submission. That threat, of course, was not confined to the fighting forces but included as well the entire civilian population. In those dark days, food for England was conspicuous among the "supplies" essential to keep her fighting. And to keep England fighting called for an adequate supply of food for the toiling workers of the home front as well as rations for the soldiers and sailors on the fighting front. Clearly, then, food and all things necessary for the production of food were comprised within the definition of defense articles. This brought within the scope of lend-lease not only food itself but the whole vast category of agricultural implements and supplies. The tractor, the plow share, the rake and the hoe, seed, fertilizer, and all things requisite to intensified production of food were articles of defense dispensable as lend-lease aid. But the plow share turning the soil of England was no more military property devoted to military and not to civil use than was the plow share used to cultivate the fields of Virginia or Maryland. Farming in England was no less a civilian occupation than farming here. It would be fanciful to describe the farmer as a soldier and his implements as arms. Here again, lend-lease is shown to have comprised civilian goods for civil use as well as military goods for military, and not for civil, use.

Reference has thus far been made only to items (1) and (2) of the definition of defense articles. Item (3) brought within the scope of lend-lease "any component material or part of or equipment for any article described in this subsection." If anything was needed beyond items (1) and (2) to make lend-lease all-inclusive, item (3) did the work. It comprised any "com-

ponent material" of any "weapon, munition, aircraft, vessel or boat" and any component material of any "machinery, facility, tool, material or supply necessary for the manufacture, production, processing, repair, servicing, or operation" of any defense article. This brought within the definition substantially all raw materials, whether in the vegetable or mineral kingdom. Products of the mine were added to products of agriculture and products of the forest as articles dispensable under the lend-lease program. Again, a miner wielding his pick in the substratum of England was no more a soldier with a weapon in his hands than was the coal miner in Pennsylvania or the worker in the phosphate mines of Florida. His implements, his supplies and the products of his labor were alike civilian property used or destined for use distinctly civil and not military in character. Yet all these were within the scope of lend-lease assistance.

Item (4) of the statutory definition of defense articles in the bill as introduced in Congress, read:

> "(4) Any other commodity or article for defense."*

In the statute, as enacted by Congress and approved by the President, item (4) read:

> "(4) Any agricultural, industrial or other commodity or article for defense."

The change was made by way of amendment on the floor of the Senate.**

It appears obvious that item (4) of the definition, both in its original and in its final form, was carefully devised to accomplish the purpose plainly intended, namely, the elimination of the smallest chance that by narrow construction of the preceding items the term "defense article" might be taken as less than all-inclusive. We have seen that items (1), (2) and (3) in fact embraced the entire fields of industrial, mineral and agricultural production. But the authors of the bill, in order to foreclose

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*Transcript of Hearings before Committee on Foreign Affairs, House of Representatives, 77th Congress, January 15, 1941, page 1; Transcript of Hearings before the Committee on Foreign Relations, United States Senate, 77th Congress, January 27, 1941, page 1.

**Congressional Record, Vol. 87, pp. 2097-9.

argument, added item (4): "any other commodity or article for defense." And the Congress, to make assurance doubly sure and foreclose any attempt to limit defense articles to commodities of a military character, enlarged item (4) to include "any *agricultural, industrial,* or other commodity or article for defense."*

If lend-lease was not thereby made all-inclusive, and if the character of material transported for export under the lend-lease program was not thereby rendered wholly consistent with the character of civilian goods moving for civil use, the English language is singularly inept as an instrument for the expression of thought and intent.

Recognizing that the amendment was a work of supererogation, yet at the same time sponsoring its adoption, Senator Barkley, in charge of the bill for the Administration, said:**

> "Mr. Barkley: Mr. President, during the discussion of the bill in the committee and on the floor various amendments have been suggested pertaining to agriculture. All along it has been our interpretation of the bill, and is now, that in the definition of defense articles, subsection 4, page 2, 'any other commodity or article for defense' is broad enough to include just what it says, 'any other commodity', which would cover agriculture, industry, or anything else. The Senator from Georgia (Mr. Russell), the Senator from Montana (Mr. Murray), the Senator from Oklahoma (Mr. Lee), and others, including the Senator from Wisconsin (Mr. Wiley), have discussed this matter. In order that there may be no doubt that the word 'commodity' includes agricultural commodities, I send forward an amendment and ask that it be agreed to."

The amendment altered item (4) as above set forth, and it was agreed to by voice vote.***

In the course of debate Mr. Clark, of Missouri, opposing the bill, said:****

> "Mr. President, the other day I challenged any Senator to rise on this floor and tell me anything which was not

*Emphasis throughout this brief supplied.
**Congressional Record, Vol. 87, p. 2097.
***Congressional Record, Vol. 87, p. 2099.
****Congressional Record, Vol. 87, p. 2098.

included in the definition of defense article, as found in Section 2 of the bill, and no Senator rose; and no Senator has been willing from the very beginning of this debate to try to define any article or any commodity, or any substance of any kind that is not included in the very broad generic term 'defense article.'"

Explaining the Senate Amendment to the House, Representative Bloom said:*

> "Amendment No. 1: This amendment is to emphasize what was already implicit in the House bill—that the term 'defense article' includes agricultural and industrial articles which are for defense. The amendment in no way changes the legal effect of the House bill."

Thus, friend and foe of the bill alike regarded and characterized the scope of lend-lease as inclusive of any and all commodities which conceivably might contribute to the defense of any country whose defense the President deemed vital to the defense of the United States.

We, in this country, learned at first hand the true meaning of "defense" in terms of modern warfare. In respect of our own war effort, we clearly recognized civilian goods for civil use as essential to the conduct of war. American farms, mines, factories, and transportation facilities were alike dedicated to prosecution of war. Strikes among civilian workers were condemned as subversive of the war effort. Civilians whose occupations were essential to efficiency in industrial and agricultural production and in transportation were retained in civilian life, and exempted or deferred from military or naval service. As already pointed out, it would have been fanciful to characterize the miner in Pennsylvania, the farmer in Virginia or Maryland and the factory worker in Detroit as soldiers or sailors, and the implements of their several occupations as arms. There is no consideration which requires or justifies a different concept of defense in other countries whose defense was deemed vital to our own. In England, as in the United States, "defense" connoted devotion of the entire energy and economy of the country to the

*Congressional Record, Vol. 87, pp. 2217-18.

assurance and hastening of victory. When we sent to England's assistance materials for consumption in industry and agriculture we contributed, not military property for military use, but aid on the "home front" in the shape of civilian goods for civil use.

The foregoing analysis of the Lend-Lease Act demonstrates fallacy at the root of the case for the United States. The circumstance that phosphate rock and superphosphate consigned to the British Ministry of War Transport moved for export to England under the lend-lease program for purposes of defense did not clothe those shipments with the attributes of military property moving for military and not for civil use. On the contrary, that circumstance was wholly consistent with the civilian character of the goods and an intended civil use. Yet the fact of export to England under the lend-lease program is the sole consideration advanced by Petitioner in support of the proposition that the shipments here involved fall within the exception contained in Section 321(a) of the Transportation Act of 1940.

Petitioner insistently argues that "defense" necessarily implies "military." Cf. Petitioner's Brief, pp. 20-1, 26, 33, 41-3, 67, 79, 102-3. This argument defies the fact, universally recognized when Section 321(a) of the Transportation Act of 1940 and the Lend-Lease Act were adopted, that modern warfare and defense call for combined military and civilian endeavor.* That the distinction between the contribution of the "military," on the one hand, and the "civilian," on the other, persisted in the legislative mind, as well as in reality, is inescapably shown by the language of the exception whereby it was provided that full commercial rates should not apply to transportation of military property of the United States moving for military *and not for civil* use.

The opinion of the District Court was characterized by the Circuit Court of Appeals as "so clear and its reasoning so cogent

*Cf. Bernard M. Baruch, Petitioner's Brief, pp. 96-7:

"Thus war requires that, at the very moment when productive effort is deprived of millions of men for military service the country's facilities for production must be speeded up to disgorge unprecedented volumes of supplies. *Civilian morale* becomes as important as *military morale* and it is necessary to make this cosmic change with the least practicable interference with the normal life of the nation."

Cf. also *Girouard* v. *United States*, 66 S. Ct. 826, cited in Petitioner's Brief, p. 98.

that we might well affirm the judgment below and adopt that opinion as the opinion of our Court." 152 F. (2d) 228, 229; R. 31. Regarding the branch of the case now under discussion, the District Court said (60 F. Supp. 433, 439; R. 26):

> "Fertilizer is an article of value defensively. That fact has been determined by the President and stipulated by the parties and the Court has no authority to review or inquire into such determination. But does the identity of an article as being of value or use in defense of the nation necessarily imply a military or naval and not civil use?"

Having thus posed the pivotal question in the case, and after citing definitions of the terms "military," "civilian" and "civil," the District Court continued (*Id.*, 439-40; R. 26-7):

> "Unless technically employed, language is to be given its ordinary meaning and from the definitions cited it follows that while the term 'defense' may and often does carry with it the idea of force, it does not necessarily mean the use of physical force. Upon the contrary it may, and often does mean the employment of efforts unrelated to physical force. . . .
>
> "Among other agencies of the Government created for the specific purpose of aiding in the prosecution of the war are the Office of Price Administration and the War Production Board, the underlying purpose of both being to combat financial inflation and resulting confusion on the home front. In addition to agencies of such nature, the regular civilian establishments of the Government are charged with responsibilities essentially related to the war effort. For example, upon the United States Attorney rests among other duties those of prosecuting persons charged with evading service in the armed forces and acquiring sites for training those called to such service.
>
> "It could hardly be contended that a typewriter or other supplies for use of any of those agencies is military or naval property of the United States or that it is moving for military or naval and not civil use.
>
> "If such a construction should be placed upon the Transportation Act, the words 'and not civil' would have no mean-

ing, although those words were obviously intended to have a meaning and were employed at a time and under circumstances indicating danger of war.

"I am unable to draw a distinction under the Transportation Act between the status of fertilizer moving for use by a farmer in Cornwall or a farmer in Haiti under the Lend-Lease Act, and fertilizer moving for use by a farmer in the middle west furnished by the Government under appropriate provisions of the Agricultural Adjustment Administration. All are engaged in the production of agricultural products essential for the successful prosecution of the war. All are producing with fertilizer which moved as property of the United States; all are engaged in one of the most traditional of all civilian occupations, constituting the antithesis of destructive effort and as far removed from martial activities as can be imagined, and all are working to supply their respective markets with such surplus as may be available.

"It is therefore my conclusion that the phosphate rock and superphosphate, within the meaning of the Transportation Act, was not military or naval property of the United States and was moving for civil use; that the counterclaim asserted by the Government should be dismissed and judgment should be rendered the plaintiffs in accordance with the prayer of the petitioner."

In view of the cogency of these observations, they seem to us controlling.

2. UNDER THE LEND-LEASE ACT, AS CONSTRUED AND APPLIED BY THE EXECUTIVE DEPARTMENT WITH THE FULL APPROVAL OF CONGRESS, PRODIGIOUS QUANTITIES OF CIVILIAN GOODS FOR CIVIL USE WERE DISPENSED TO FOREIGN COUNTRIES AS LEND-LEASE AID.

No principle of construction is more firmly established than that great weight attaches to the practical construction of a statute adopted and applied by the Executive Department charged with its administration. Only for the most weighty reasons will such construction be disregarded. A practical administrative in-

terpretation adopted and approved by the legislature is virtually binding upon the courts. *United States* v. *Jackson*, 280 U.S. 183, 74 L.Ed. 361; *United States* v. *American Trucking Associations*, 310 U.S. 534, 84 L.Ed. 1345; *National Lead Co.* v. *United States*, 252 U.S. 140, 64 L.Ed., 496; Annotation—Effect of Practical or Administrative Construction of a Statute on Subsequent Judicial Construction, 73 L.Ed. 322-375, where the multitudinous authorities are collected.

We think that the language of the Lend-Lease Act defining "defense articles," unaided by practical interpretation, leaves no room for doubt that assistance to foreign countries under the Act comprised aid in the form of civilian property transported for civil and not for military use. But should a doubt be entertained as to this, it will certainly be dispelled by the practical interpretation uniformly placed upon the Act by the Executive Department, with the full acquiescence and approval of Congress.

The President, at first through the Lend-Lease Administration and later through the Foreign Economic Administration, regularly dispensed to countries whose defense he deemed vital to the defense of the United States enormous quantities of non-military and distinctly civilian goods. He repeatedly so reported to Congress. And Congress, with those reports before it, repeatedly endorsed and approved the President's course, by enabling its continuance through the enactment *seriatim* of the necessary Appropriation Acts.

It has already been stated that the President was required by the Act to report quarterly to Congress his operations under the Act. His reports establish, beyond doubt or any room for dispute, that in practice the lend-lease program included export of civilian goods for civil use. Particularly apposite extracts are collected in Appendix B to this brief (p. 55). We urge them upon the attention of the Court. The Reports will be referred to herein as "First Report," "Second Report," etc. In Appendix B they are more formally identified.*

*The "Eighth Report" and the "Seventeenth Report", as referred to herein, are reports made pursuant to Presidential direction by the Lend-Lease Administrator and the Foreign Economic Administrator, respectively. It results that our references do not in all instances correspond to the numbering on the face of certain of the reports transmitted by the President to Congress.

The First Report tabulates defense articles exported in the first three months of lend-lease. This tabulation, after listing wide categories of military and naval arms and supplies, including provisions (pp. 9-11), adds, among other things (pp. 11-12): Facilities and equipment for *production,* $137,134,818.00; *Agricultural* implements, $1,258,814.00; *Roadbuilding* equipment, materials and supplies, $2,650,054.00; *Metallic minerals* (including iron and steel, copper and brass, zinc, lead, and other metals and alloys), $135,794,596.00; *Non-metallic minerals* (including nitrates and *phosphates*), $1,250,000.00; and *Petroleum and coal products,* $2,898,400.00. Most of the reports contain tabulations showing clearly that articles and materials for purely agricultural and industrial use, as distinguished from arms, munitions and military supplies to be devoted to military use, were constantly supplied in prodigious quantities under the lend-lease program.*

Not only do the reports separate lend-lease aid in terms of munitions, industrial materials, and agricultural products, but they frequently divide such aid into categories of "military" goods, on the one hand, and "non-military" goods, on the other. For example, in the Fourth Report, at page 14, there appears a table denominated: "Quantities of NON-MILITARY Goods Transferred," and among other items fertilizer is listed. In the same Report, at page 18, is found a diagram entitled: "Lend-Lease Exports—Classification of Lend-Lease Exports by *Type.*" This diagram shows: (1) *Military* Items, 29%; Foodstuffs, 34%; and Industrial Materials, 37%. Chapter 3 of this Fourth Report, entitled "Lend-Lease in Action," divides lend-lease material into classes, as follows: (1) *Military* (p. 19); (2) *Industrial* (p. 20); and (3) *Agricultural* (p. 21). In the Seventh Report, page 9, is found a chart making a like classification. The accompanying text states:

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*First Report, pp. 11-12; Second, pp. 12-13; Third, p. 10; Fourth, pp. 13-14; Fifth, p. 28; Seventh, p. 18; Ninth, pp. 24-5; Tenth, p. 12; Eleventh, p. 11; Thirteenth, pp. 10, 17, 56; Fourteenth, pp. 31, 34, 37, 41, 43, 46, 50, 54, 57; Fifteenth, pp. 9, 13, 15, 25, 31, 34, 37, 40, 45, 49; Sixteenth, pp. 11, 20, 23, 25, 30, 33, 34, 36, 58; Seventeenth, p. 28. The most frequent breakdown of lend-lease defense articles is (1) Munitions, (2) Industrial Materials and Products, and (3) Agricultural Products. As to Petitioner's contention in respect of the Lend-Lease Reports, see *infra,* p. 18, *et seq.*

> "Exports of *military* items have risen much more rapidly than exports of *non-military* items. . . . While total monthly lend-lease exports increased over six times, lend-lease exports of *military* items increased fourteen times."

Petitioner is at pains in attempting to discount the effect of the lend-lease reports.* Thus, on page 12 of its brief, Petitioner says that "civilian supplies," "military items," and "non-military goods," are terms used "elastically and for statistical reasons only." Our "main error, in reading the lend-lease reports," according to Petitioner (p. 34), is our "failure to note that the agencies administering lend-lease have been entirely flexible in using terms such as 'military items,' 'military goods,' 'non-military items,' or 'industrial materials and products,' in the senses most convenient for their own current accounting and statistical purposes, and without any intention of affecting the application of the Transportation Act of 1940 or any other statute."

Passing the arresting suggestion that practical interpretation is to be discounted because ingenuous, we point to the fact that, aside from graphic and statistical classification, the reports abound with evidence that supply of civilian goods for civil use was part and parcel of the lend-lease program. Thus, of shipments to the Netherlands East Indies, it is said in the Second Report, at page 25, that they included "a wide assortment of *commercial goods* urgently needed for the minimum existence level of this island territory cut off from its home sources of supplies." The Third Report, pages 24-6, refers to the appearance of lend-lease goods *"on the grocers' shelves and in the kitchens of Great Britain"* and to the fact that 1,300,000 *small children* were receiving, *"through maternity and child-welfare clinics and local food officers,* a regular supply of concentrated orange or blackcurrant juice, and of cod liver oil compound." The Fourth Report, page 21, points to the shipment of lend-lease machinery and

*Petitioner's Brief, pp. 12; 34-44. Petitioner insists that "non-military" categories in the reports "unquestionably" include supplies which are to be regarded as nevertheless military property moving for military use (p. 36). We do not find in the record support for this assertion; but, be that as it may, the point is that the reports unquestionably show that Lend-Lease did include civilian goods moving for civil use. As has been shown, Petitioner's case depends upon the proposition that *all* lend-lease material was military property moving for a military and not a civil use.

other equipment to fortify "the *heavy industries* and *agriculture* of our allies." In the Eleventh Report, page 7, we are told of provision through lend-lease of "raw materials and industrial equipment" which enabled the United Nations "to expand their output of finished munitions and to meet *essential civilian needs*." The same Report, pages 24, 26, 28, recounts the shipment of *seeds* for planting, and with reference to North Africa says that food was sent "to tide the *civilians* over until the 1943 crop could be harvested." Constant references are made to lend-lease material as essential for "millions of men in allied lands who . . . worked long hours in munitions plants" (Thirteenth Report, page 8); for "the British workers who built the plane" (Sixteenth Report, page 9); for "the Soviet people in the production of their own foods" (Id., p. 30); for "non-belligerent countries," which were supplied with "the minimum quantities of *consumer* and *industrial* goods required to enable them in turn to supply other commodities essential for allied war production" (Seventeenth Report, p. 9).

An aspect of the lend-lease program which demonstrates with peculiar clarity that it comprised civilian property moving for civil and not for military use was foreshadowed by the President in his letter of transmittal accompanying the Seventh Report. He there said (Seventh Report, page 5):

> "We also have another task, which will grow in magnitude as our striking power grows, and as new territories are liberated from the enemy's crushing grip. That task is to supply medicines, food, clothing, and other dire needs of those peoples who have been plundered, despoiled and starved."

Describing what had already been done, and foreshadowing the magnitude which this civilian relief and rehabilitation program was to attain under the Lend-Lease Act, the Seventh Report, at pages 24-5, states:

> "Less than a week after our landing in North Africa, the Lend-Lease Administrator was instructed, in cooperation with General Eisenhower and the State Department, to extend aid to those areas in French Africa occupied by United Nations forces.

"The policy of the United States, already announced, is to provide food, medicines, and other necessities to alleviate the hunger and suffering of the people in any territory occupied by our forces, so far as it is humanly within our power to do so. Weapons will be furnished to the armed forces of these territories to hasten the defeat of the Axis.

* * * *

"Steps have already been taken with respect to North Africa in execution of this policy. About $5,000,000 worth of *civilian goods* have been purchased for shipment to that area. Many times that amount will be procured during the coming months, to be sent as shipping space becomes available. . . . Cargoes necessary to maintain our armies in the field will have top priority on shipping, but *civilian supply* will come next on the list."

In the Ninth Report, p. 26, the North African program is elaborated. It is there shown that the Lend-Lease Administration "is working in close relationship with the Office of Foreign Relief and Rehabilitation Operations in the North African *civilian supply program,*" in order to "strengthen the *civilian front* behind the lines where famine and pestilence might seriously jeopardize our chances of success on the actual fighting lines."

Adverting to the Middle East, the Tenth Report, page 20, reads:

"Through the Middle East Supply Center we are helping to provide, both on a cash and a lend-lease basis, *supplies needed to prevent a breakdown of the civilian economy* of Iraq, Iran, Egypt, and other countries of the region. . . ."

Of especial interest to the Court in this case is the following extract from the Fifteenth Report, page 38:

"Civilian supplies shipped to French Africa under lend-lease are paid for at full landed cost. With the help of these shipments production of food and other materials needed for the United Nations war effort is being increased. *We have sent to Tunisia and Morocco, for example, equipment to increase production of the phosphate mines. The ferti-*

lizer produced by these mines is needed both for the United Kingdom's intensive food-production program and for the restoration of food production in the liberated areas of occupied Europe. Seeds, insecticides, farm tools, parts for agricultural machinery, binder twine and other supplies have been sent to increase the production in North Africa of food needed by our forces. Railroad equipment has been sent to West Africa and Equatorial Africa so that greater quantities of peanut and palm oils, cocoa, mahogany, tin, copper, jute and other strategic materials and commodities needed by the United Nations can be brought out from the interior to the coast."

It will not escape the Court that in this report we have "phosphate mines" associated solely with the production of "fertilizer"; the use of fertilizer associated, as of course it must be, solely with agriculture; and the whole embraced within the category of "civilian supplies."

In the light of the foregoing, it is difficult to perceive how there can be doubt concerning the practical construction placed upon the definition of "defense articles" found in the Lend-Lease Act. The term was construed as virtually all-inclusive. Civilian goods such as machine tools; equipment and supplies for factories; agricultural implements and supplies, including seeds, fertilizers, insecticides and binder twine; raw materials, whether vegetable or mineral; foodstuffs of every variety; shoes and civilian clothing—all these and more besides were exported under the lend-lease program for use by the civilian populations of the recipient countries in civil occupations such as manufacturing, farming and mining, or for the sustenance and relief of the inhabitants of ravished lands. Beyond question, the interpretation placed upon the term "defense article" by the Executive Department charged with administration of the Lend-Lease Act was that it included civilian property moving for civil and not military use as well as military property moving for military and not for civil use.

This construction was consistently followed. As required by the Act, the lend-lease reports were submitted to Congress. Not by silence alone did the Congress acquiesce. It repeatedly

and affirmatively approved and adopted the construction placed upon the Act by the Executive Department. At intervals throughout the period covered by the reports, and assuredly in the light of the information so clearly set forth therein, Congress appropriated for continuance of the program the staggering total sum of $66,667,498,000.*

Certainly it must be a conclusive presumption that Congress authorized the expenditure of this colossal sum from the public treasury only upon careful study and full understanding of how and for what it was being expended, as shown in reports which the Congress had itself required that the President make to it. This long series of appropriations, running in almost every instance into billions, is certainly no lesser affirmation of endorsement of the practical construction placed by the Executive Department upon the term "defense article" than re-enactment unchanged of the Lend-Lease Act itself would have been. The administrative interpretation becomes the legislative interpretation as well, and thus, under the authorities already cited, binding upon the courts.

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* I. LEND-LEASE APPROPRIATIONS TO THE PRESIDENT

First Lend-Lease Appropriation, March 27, 1941	$ 7,000,000,000
Second Lend-Lease Appropriation, October 28, 1941	5,985,000,000
Third Lend-Lease Appropriation, March 5, 1942	5,425,000,000
Fourth Lend-Lease Appropriation, June 14, 1943	6,273,629,000
Fifth Lend-Lease Appropriation, June 30, 1944	3,538,869,000
Sixth Lend-Lease Appropriation, July 5, 1945	2,475,000,000
Total	$30,697,498,000

II. LEND-LEASE TRANSFERS AUTHORIZED FROM OTHER APPROPRIATIONS

War Department:	
Third Supplemental, 1942	$ 2,000,000,000
Fourth Supplemental, 1942	4,000,000,000
Fifth Supplemental, 1942	11,250,000,000
Sixth Supplemental, 1942	2,220,000,000
Military Appropriation Act, 1943	12,700,000,000
Navy Department:	
Second Supplemental, 1943	3,000,000,000
Departments other than War:	
Third Supplemental, 1942	800,000,000
Total	35,970,000,000

* (See Twentieth Report, Table 24, page 53)

As to the effect of these reports, the Circuit Court of Appeals, 152 F. (2d) 228, 229; R. 32, said:

> "An even stronger reason against the Government's contention is the fact that the whole history and administration of the Lend-Lease Act show definitely that two separate types of assistance were contemplated: (1) military or naval; (2) civil. Nowhere is this more cogently shown than in the numerous reports of President Roosevelt to Congress on just what had been done in administering the Lend-Lease Act. On the strength of these reports, Congress continued to make further Lend-Lease appropriations and no amendment of the Transportation Act was made or sought."

And the District Court (60 F. Supp. 433, 438-9; R. 26) said:

> "In the several reports a distinction is drawn between military and non-military goods. For example, in the report of August 24, 1944, Table No. 3, appearing on page 11, is denominated: 'Quantities of Non-Military Goods Transferred,' and among other items lists fertilizer—the article with which we are now concerned. Similar instances appear at many places in the various reports and innumerable illustrations of the transfer of articles strictly for use by civilians might be shown.
>
> "It would appear that Congress adopted or approved this interpretation. The President has repeatedly reported to Congress the distribution of huge quantities of non-military and distinctly civilian goods and with these reports before it Congress has endorsed and approved this course by enabling its continuance by the enactment of the necessary appropriation acts."

At the risk of undue repetition, we emphasize again that the sole consideration advanced by the United States as bringing the shipments involved in its counterclaim within the exception contained in Section 321(a) is the circumstance that they moved over the Seaboard consigned to the British Ministry of War Transport for export to England under the lend-lease program. The foregoing analysis of the terms of the Lend-Lease Act and its approved practical application is submitted as conclusive of the inadequacy of this single consideration to override definitive proof of the agricultural character and use of the materials here involved, and thus constitute phosphate rock and superphosphate

"military or naval property of the United States moving for military or naval and not for civil use."

V.

COMMENT UPON OTHER CASES INVOLVING AN INTERPRETATION OF THE EXCEPTION CONTAINED IN SECTION 321(a) OF THE TRANSPORTATION ACT OF 1940

Subsequent to decision of the instant case and the *Atlantic Coast Line* case (No. 57) by the District Courts, decisions were rendered in three other cases involving an interpretation of the exception in Section 321(a) of the Transportation Act of 1940. In none of those cases did the facts correspond to the facts in this case. In the interest of complete presentation, we comment briefly upon them here.

The first decision was that of the District Court for the Western District of Wisconsin in *Northern Pacific Ry. Co.* v. *United States*, (Jan. 15, 1946) 64 F. Supp. 1, affirmed by the Circuit Court of Appeals for the Seventh Circuit July 8, 1946, 156 F. (2d) 346, now pending in this Court on writ of certiorari. The courts below held subject to land-grant deductions the following articles: (1) copper cable for use in insulation of degaussing equipment (to neutralize magnetic mines); (2) lumber for construction of a munitions plant; (3) lumber for construction of pontoons; (4) bowling alley equipment for recreational use, initially by civilian employees, but later by military personnel; and (5) liquid paving asphalt for construction of runways at an airport. Whatever disposition be made of that case in this Court, it is clear that the instant case, involving, as it does, lend-lease material exported to Great Britain for agricultural use, is a wholly different case.

This was recognized by both the District Court and the Circuit Court of Appeals in the *Northern Pacific* case, the latter court saying, 156 F. (2d), at page 350:

> "Counsel cites Powell v. United States, D. C., 60 F. Supp. 433; Id., 4 Cir., 152 F. 2d 228. In this case the United States had shipped phosphate to the British Ministry of Transport to be sent under lend-lease to Britain to be used by farmers

there as fertilizer. The Court found that lend-lease goods were divided into three classes: (1) military, (2) industrial, and (3) agricultural. The use here was agricultural and civil as distinguished from military and naval."

It is thus apparent that the court there had no fault to find with the decision below in the instant case, and that the cases are different.

The second decision was *Southern Pacific Company* v. *Defense Supplies Corporation*, (Jan. 21, 1946) 64 F. Supp. 605, now pending on appeal to the Circuit Court of Appeals for the Ninth Circuit. There it was held that shipments by Defense Supplies Corporation to itself of benzol to be manufactured into aviation gasoline and tires for use by the armed forces was military property moving for military use, within the meaning of Section 321(a). It will be noted that in the opinion of the District Court in that case the words "military" and "naval," and by the same token the word "civil," as used in Section 321(a), are to be understood as descriptive, not alone of the nature of the property itself, but also of the nature of its contemplated use (64 F. Supp., at p. 607). The court was of opinion that the relationship of the transportation of the benzol "to the physical force of conflict and combat was actual and proximate" (*Id.*, p. 608).

Whatever may be thought of the decision in the *Southern Pacific* case, clearly it is without bearing upon the instant case. For here the property was lend-lease fertilizer for agricultural use and there is a complete absence of actual and proximate relationship to the physical force of conflict and combat. That the instant case was brought to the attention of the court in the *Southern Pacific* case appears from the court's reference to this case in a footnote (*Id.*, p. 608). The fact that the instant case was not discussed indicates that the court there correctly concluded that the cases do not bear the one upon the other.

The remaining case is *Southern Pacific Co.* v. *United States*, Court of Claims No. 45952, No. 46012, decided October 7, 1946, not yet reported. It was there held that lend-lease shipments of motor vehicles, spare parts, etc., under consignment to Chinese

Defense Supplies, Inc., upon requisition made by the Republic of China, under the lend-lease arrangement, as for "Army use," moved subject to land-grant deductions. That requisition contrasts with the requisition in the instant case, which called for phosphate fertilizers to be imported and distributed to effectuate Great Britain's revised agricultural program (R. 15). According to the opinion of the Court of Claims, no question as between civil and military use was there presented, but rather the question whether disposition to a foreign government constituted "use" within the meaning of the statute. On this point, the Court of Claims cited the opinion of the District Court in the instant case, on a point perhaps not necessary to the decision, as follows:

> "In *Powell* v. *United States*, 60 Fed. Supp. 433, 437, affirmed on appeal, 152 F. (2d) 228, a case under the same statutory provision, but involving shipments of phosphate rock and superphosphate, ultimately destined to Great Britain for agricultural purposes, the District Court, by Judge Hutcheson, propounded two questions to be answered, the first, whether under the Transportation Act of 1940 the phosphate rock and superphosphate were military or naval property of the United States, and second, whether it was moving for military or naval and not for civil use. As to the second question the Court said:
>
> > 'The second question does not involve a consideration of of the nation by which the property might be put to military or naval use. Such use of the property by a power other than the United States would seem to be such military or naval use as would be sufficient for the requirement of the Act.'
>
> "With this conclusion we agree."

It is manifest that the *Southern Pacific* case in the Court of Claims is to be distinguished from the instant case and that, whatever may be thought of the conclusion reached by the Court of Claims, its decision is without bearing here.

VI.

PETITIONER'S BASIC CONTENTION

It is fair to say that the argument advanced on behalf of Petitioner comes down to the proposition that, because of the character of modern warfare, all material furnished to a belligerent country in the interest of the defense of the United States was necessarily "military or naval property" destined for "military or naval and not for civil use"—and this without regard to the nature of the article supplied or the character of its intended and actual use. (Cf. Petitioner's Brief, pp. 32-3, 40-1; 44; 79.) Only from so extreme a position could it be argued with even a show of plausibility that agricultural fertilizer for use by the farmers of Great Britain constituted military property for military as distinguished from civil use.

Our position, in answer, is that agriculture in belligerent Britain was no more a military calling than agriculture in belligerent America; that fertilizer for the British home front was no more a military commodity than fertilizer for the American home front; that total war no more extinguished the distinction between the civilian and the military in England than it did in America; that it would occur to no one to classify farming in this country, even in times of total war, as a military undertaking; that it would be sophistry to hold enrichment of English soil a military end, but enrichment of our own lands a civil objective.

It will not do to seek a distinction, as Petitioner inferentially does (Petitioner's Brief, p. 49), in the extremity of England's need. It cannot be forgotten that needs of an urgent character developed in our own country. But at all events an extreme need in respect of fertilizer for farming is no less a home-front requirement of a civilian character than would be a more moderate need. Wars may be won or lost on the home front, but the home front remains the civilian as distinguished from the military front. Small wonder, then, that the District Court was "unable to draw a distinction under the Transportation Act between the status of fertilizer moving for use by a farmer in Cornwall or a farmer in Haiti under the Lend-Lease Act, and fertilizer moving for use by

a farmer in the Middle West furnished by the Government under appropriate provisions of the Agricultural Adjustment Act."

VII.

PETITIONER'S CONTENTION FOR A LIBERAL CONSTRUCTION OF THE EXCEPTION IN SECTION 321(a)

In its Brief (pp. 16, 103-6) Petitioner insists that Section 321(a) was not remedial legislation but was, on the contrary, a relinquishment of a preexisting right partaking of the nature of a new grant without consideration, and thus related to a bounty. Therefore, Petitioner argues, the scope of the partial repeal of land-grant rates effected by Section 321(a) should be strictly construed and the exception of military property for military use liberally construed. Petitioner relies, for authority, upon *Southern Pacific Co.* v. *United States*, 307 U.S. 393, *Great Northern Ry. Co.* v. *United States*, 315 U.S. 262, *Slidell* v. *Grandjean*, 111 U.S. 412, and *Southern Ry. Co.* v. *United States*, 322 U.S. 72.

But the history of land-grant rates, now to be discussed, establishes unmistakably that the legislation was in fact remedial, and that the abolition of land-grant rates subject to the exception of military property for military use was based upon consideration moving from the railroads to the United States. No element of bounty was involved, and the remedial measure calls for a liberal construction. From this it follows that the exception of military property for military use should receive a narrow construction.*

THE HISTORY OF LAND-GRANT RATES.—Between the years 1850 and 1870, the United States granted public lands to a number of railroads in the west and south. The land was unsettled. The policy underlying the grants was to encourage the building of railroads in these unsettled areas.

*On page 106 of its Brief, Petitioner suggests that "it may well have been an accident of draftsmanship and of the legislative course of the statute that Section 321 cast its provision concerning 'military or naval property' in the form of an exception rather than as main text." This is a wholly unjustified attempt to rewrite the Act of Congress. Obviously, the retention of land-grant deductions in respect of military property for military use was properly framed as an exception to the abolition of land-grant rates in respect of all other property.

The construction of portions of the Seaboard's line in Florida was aided by land-grants to certain of its predecessor corporations, through grants by the United States to the State of Florida, which in turn granted the land to the railroad corporations. The original grant to Florida was made for construction of a main line from Fernandina to Tampa Bay and a branch line from Waldo to Cedar Key. The grant contained, *inter alia*, the following condition:

> ". . . the said railroad shall be and remain a public highway for the use of the Government of the United States, free from toll or other charges upon the transportation of any property or troops of the United States." Act of May 17, 1856 (Section 3) (11 Stat. 15).

A like condition was imposed by the terms of grants of public lands to other railroads.

In *Lake Superior & Mississippi Railroad Company* v. *United States*, 93 U.S. 442, this condition was construed as conferring only the free use of the railroad roadbed as a highway, the Court saying:

> "We are of the opinion that the reservation in question secured to the Government only a free use of the railroads concerned, and that it does not entitle the Government to have troops or property transported by the companies over their respective roads free of charge for transporting the same."

Following this decision, the Court of Claims held that a fifty per cent reduction in rates should be made by reason of the right of the Government to use the roadbed free of charge. *A. T. & S. F. R. R. Co.* v. *United States*, 15 Ct. Cl. R. 126. Somewhat later, Congress enacted a statute providing that land-grant rates should be such as the Secretary of War deemed just and reasonable, not exceeding fifty per centum of the full commercial rates. Act of June 7, 1924, c. 291, Title I, 43 Stat. 486; 10 U.S.C.A. §1375. In conformity with this statute, the land-grant railroads, up to the time of enactment of Section 321(a) of the Transportation Act of 1940, transported over the land-grant portions of their

lines at half rates *all* property of the United States. Competing lines of railroad, e.g. the Atlantic Coast Line, in order to participate in the traffic, entered into so-called "equalization agreements" to meet the land-grant rates.

During the decade 1930 to 1940, the United States became engaged in a wide variety of relief measures, and various corporations were organized by the government for relief purposes. These governmental agencies became important shippers by rail of a heavy volume of diversified civilian goods. Such shipments, under the Land-Grant Acts and the equalization agreements, were entitled to move at one-half the commercial rates. Inasmuch as this class of material was of a kind not in contemplation when the original Acts were adopted, the result was clearly unjust. The railroads sought legislative relief. (See testimony of R. V. Fletcher, Vice-President, Association of American Railroads, before subcommittee of the Senate, 78th Congress, Second Session, on H. R. 4184, a bill to repeal land-grant rates, pages 15 to 19).

On March 17, 1938, the President appointed a committee, made up of the then Chairman of the Interstate Commerce Commission and two other members of the Commission, to bring forward specific recommendations for dealing with the railroad situation. On March 24, 1938, that committee submitted to the President a report which he formally transmitted to Congress, and which was printed as House Document No. 583 of the 75th Congress, Third Session. The committee's recommendation relating to land-grant deductions was as follows:

> "For many years land-grant reductions, usually 50 per cent of the revenue accruing to that portion of the line which is Government aided, have been made on Government traffic. Through an equalization arrangement competing roads make the same reduction on Government traffic in order to participate in the business. The reduction on this account for 1937 is estimated at $7,000,000. For the most part it affects roads in the western district where as above noted, financial conditions are worst. The increase in Government shipments in recent years has made this reduction from the normal rates assume important proportions. No good reason appears why such reduction should continue. After all, the country

must support whatever transportation system it uses. The Government, as a shipper, may well pay reasonable rates. We recommend appropriate amendments to existing statutes to remove the requirement for land-grant reductions."

Subsequently, on September 20, 1938, the President appointed another committee made up of three railroad executives and three railway labor executives to consider the transportation problem and recommend legislation. This committee was known as the "Committee of Six." Its report likewise recommended abolition of land-grant deductions, in the following language:*

"Certain statutes by which grants of land were made by the Government in aid of the construction of 17,627 miles of railroad in pioneer days stipulate that the Government shall forever have the use of such roads for the transportation of troops and property of the United States free of any toll or charge. Early in the history of these acts the Supreme Court construed them as not contemplating free transportation service for the Government but only free use by it of these roads in performing its own transportation service. It further found that about 50 per cent of the total railroad costs was incident to the provision and maintenance of the roadway and tracks and so established 50 per cent of the normal commercial rate as the proper basis of charge to be made by the railroads for transportation services performed by them for the Government over land-grant lines.

"Routes in competition with those containing land-grant mileage must meet the reduced rates of the latter on through Government traffic. The total so-called land-grant reductions in rates on Government traffic, including mail, now amount to about $10,000,000 per year. There are now 69 different agencies and departments of Government which receive the benefit of these reduced rates, and the number is constantly increasing. This traffic has grown to a volume far in excess of anything that could possibly have been in contemplation of the parties at the time the land grants were made. The Government received more than full consideration for the lands granted in the enhancement in value of the adjoining

*Hearings, 76th Congress, House Committee on Interstate and Foreign Commerce, H. R. 2531, Vol. I, pages 259-308, at pages 271-2.

lands retained by it which resulted from the construction of the railroads, to say nothing of the amount already received by it in the way of reduced transportation charges.

"The Government should recognize the inequity of requiring transportation for itself at rates below those fixed by one of its own regulatory agencies as reasonable for application to its citizens.

"We therefore recommend the repeal by the Congress of the reduced rate provisions of these land-grant statutes."

In 1938, there was introduced in the 75th Congress a bill (H.R. 10620) to repeal land-grant rates. In the course of hearings held by the House Committee on Interstate and Foreign Commerce, May 31, 1938, to June 2, 1938, Lt. Col. Carl Halla, Finance Department, General Staff, United States Army, speaking for the War Department, presented an official report prepared by the War Department for presentation to the Committee. In part, this report read (pp. 16-17 of Report of Hearings):

"When the land-grant agreements were entered into, the majority of Government property shipped throughout the United States consisted of property, rations, uniforms, and equipment of the armed services. Today this situation has materially changed and agencies of our Government have entered into activities which require them to ship as Government property all classes of supplies and materials, including hogs, cattle, wheat, butter, eggs, forest service supplies, construction materials used to further general employment. The increase in Government shipment in recent years has made the land-grant deduction benefits assume enormous proportions.

"While it is agreed that the nation must support whatever transportation system is required and is desired to be continued, it is the view of the War Department that no injustice would arise if the railroads are required to continue under present agreements to transport troops and *supplies for military and naval services* at reduced rates. However, there appears to be no good reason why the railroads should be required to transport at reduced rate classes of property not foreseen or anticipated when the original agreement was entered into.

"For the reasons stated above the War Department can see no objection to the provisions of the proposed legislation if the Bill is amended to include the following additional provision:

"On line 7 after the word 'government' insert 'except such provisions as require reductions in the compensation received for the transportation of men, officers, or personnel in any branch in the military or naval service, and military or naval property.' "

So far as we have been able to ascertain, this War Department report originated the thought of an exception in favor of "military or naval property." The 75th Congress did not enact the bill, but at the following session Section 321 was enacted and incorporated into the Transportation Act of 1940. The hearings immediately preceding the enactment are without particular bearing here,* except that the Committee was referred to the record of the previous hearings, including the report of the War Department presented by Lt. Col. Halla. That report makes it clear that in suggesting an exception retaining land-grant deductions in respect of "military or naval property" the War Department had in mind "supplies for military and naval services," and nothing more. (Cf. Mr. Pearson's comments quoted at p. 61 of Petitioner's Brief.)

Far from being without consideration and in effect a bounty, the partial relinquishment by the United States of the right to land-grant deductions was in fact supported by substantial and adequate consideration. Section 321(b) of the Transportation Act of 1940 conditioned the applicability of Section 321(a) upon release by the railroads of all outstanding claims to lands, in the following language:

"(b) If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such

*Cf. Petitioner's Brief, pp. 65-6.

carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from September 18, 1940."

The substance of the consideration provided for by this requirement of release is clearly shown in the testimony of Mr. Fletcher at the aforementioned hearings on H. R. 4184. Those hearings were conducted during June and August of 1944. On page 20 of the printed report of the hearings, Mr. Fletcher made the following statement in answer to a question from Senator Austin:

"Now, that act provided, I should say, that any railroad that desired to take advantage of this provision in the 1940 act, this section 321, should grant back to the Government any lands which had not actually been patented to those railroads, and which had not been reduced to possession so to speak. As a matter of fact, there were many millions of acres of land which were the subject of dispute between the Government and the railroads, and lawsuits were pending in the courts throughout the country, and applications for patents which had been held up for one reason or another. All of the railroads that had received grants and had claims of this character released those claims in order that they might qualify to secure the full domestic, commercial rates on civilian traffic."

On the same page, in answer to questions from Senator Stewart, Mr. Fletcher testified:

"Senator Stewart: Yes. Now you say a great many railroads undertook to avail themselves of that?

"Mr. Fletcher: All of them did. All of the land-grant railroads that had any claims whatever filed releases with the Government relinquishing any claims to that land.

* * * *

"Senator Stewart: You can compile that information and put it into the record?

"Mr. Fletcher: Well, I think I can give it to you in summary fashion pretty well.

"Now, here is a statement made by the Secretary of the Interior after there had been concluded all of these arrangements for the surrender by the railroads of their claims to the land not patented. Under date of April 20, 1941, the Secretary of the Interior issued this public statement:

"' 'More than 8,000,000 acres of land in 11 Western States—an area larger than the war-stricken Netherlands—have been restored to Federal ownership with the completion of 6 months' work in closing out early railroad land grants, Secretary of the Interior Harold L. Ickes said today in announcing his approval of a formal release submitted by the Northern Pacific Railroad Co., of all further claims under its grants made in 1864 and 1870.

" 'Under the terms of the Northern Pacific release—the last and largest of the historic railroad land grants closed out by the General Land Office in accordance with provisions of the Transportation Act of 1940—approximately 4,500,000 acres of land in Washington, Montana, Idaho, Oregon, North Dakota, Minnesota, Wisconsin, and Wyoming will revert to the Federal ownership for administration under the conservation program of the Department of the Interior.

" 'Releases previously approved by the Secretary resulted in the restoration to the public domain of approximately 2,000,000 acres of land in Southern California by the Southern Pacific, and 1,600,000 acres in Arizona and New Mexico by the Atchison, Topeka & Santa Fe Railroad. The value of the land is unappraised.

" 'In addition to its relinquishment of claims to the grant lands, the rights of the Northern Pacific to timber-

cutting contracts on 3,600 acres in Washington, and telephone, pipe line, rights of way, and other permits and licenses on 1,200 acres in Minnesota, Montana, Washington, and Wyoming, also have been assigned to the Federal Government.'"

Further, on page 21, Mr. Fletcher made the following statement in answer to a question from Senator McFarland:

"Mr. Fletcher (reading):

" 'Approval of the release also makes possible the termination of a 10-year lawsuit between the Government and the railroad company—'

he means now the Northern Pacific— ':

" 'based on the terms of the land grant totaling 43,159,000 acres made to the company and its predecessors more than three-quarters of a century ago.'

"Somewhere or other, the distinguished Secretary of the Interior stated that this was the greatest real estate transaction in history, as I have no doubt it was."

It thus clearly appears that the relinquishment by the United States of land-grant deductions from commercial rates on civilian property was conditioned upon the release of all claim by the railroads to some 8,000,000 acres of land which reverted to the public domain, the release constituting, according to the Secretary of the Interior, the greatest real estate transaction in history.

In addition to the fact that the partial abolition of land-grant rates provided for in Section 321(a) was supported by substantial consideration under the release provision contained in Section 321(b), there is the further fact, developed by the "Committee of Six" (see *ante*, pp. 31-2), that the United States "received more than full consideration for the lands granted in the enhancement in value of the adjoining lands retained by it which resulted from the construction of the railroads, to say nothing of the amount already received by it in the way of reduced transportation charges."

In view of the foregoing, we respectfully submit that the rule of construction urged by Petitioner on brief and founded upon the conception of Section 321(a) as a bounty without consideration is not applicable here.

A graphic demonstration of the remedial character of legislation to abolish land-grant rates* is found in the circumstance that abolition of those rates was strongly urged by the Interstate Commerce Commission and by the shippers of the country, in order to put an end to discrimination inherent in the arrangement. Thus, when a subcommittee of the Senate Committee on Interstate Commerce had under consideration H. R. 4184, abovementioned, Commissioner Mahaffie submitted a letter from the legislative committee of the Interstate Commerce Commission which read in part as follows:**

> "The Commission is also interested in the effect of the land-grant law on shippers. In the hearings before the House Committee on Interstate and Foreign Commerce many examples of distortion of normal rate relations by the land-grant rates were disclosed. These play a prominent part in influencing the ability of producers to compete for Government contracts. The situation is aggravated by the inability of shippers to ascertain what the land-grant rates are from either their own points of production or those of their competitors, since these rates cannot be found in tariffs open to inspection, . . .
>
> "It is well recognized that the requirement that the rates of common carriers be a matter of public knowledge is essential to the discovery and prevention of the discrimination and undue prejudice and preference which are declared unlawful by the Interstate Commerce Act. It is anomalous that the Federal Government, which is responsible for the legislative policy embodied in that act, should countenance a system of rates applicable to its own property not in accord with that principle in disregard of the duty to protect shippers from unlawful inequalities."

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*Cf. Petitioner's Brief, pp. 64-5, footnote 31.

**Hearings, Subcommittee of the Senate Committee on Interstate Commerce, 78th Congress, H. R. 4184, pp. 8-9.

In the course of the same hearings,* John B. Keeler, President of the National Industrial Traffic League, a national organization of shippers with members scattered practically throughout the United States, said:

> "The point I would like to leave with you gentlemen is this: that the shippers of this country are solidly back of this bill, practically 100 percent. I have sat in meetings of different shipping organizations throughout the country, have heard the debate on this question, and know that they are very, very strongly in favor of the passage of the bill. In fact, shippers started agitation for the repeal of land-grant rates before the railroads became active in the matter.
>
> "The interests of shippers arise in two ways principally:
>
> "1. Because of the discrimination inherent in these rates a shipper located on a non-land-grant road competing with a shipper located on a land-grant road is at a distinct disadvantage in competing with the shipper who gets the benefit from the Government when receiving land-grant rates. Also, shippers are unable to ascertain what land-grant rates are in effect. If a shipper goes to any Government department seeking information on the question he is informed it is not the policy of the Government to give out information with regard to land-grant rates. As a consequence, in competing on Government business a person is competing in a blind way. People do not know what their competitors have to pay. That situation has resulted in general disfavor upon the part of shippers, I mean with regard to land-grant rates.
>
> "2. Next, the general interest of the shipper is that to the extent the Government fails to pay its fair share of the transportation burden other shippers have to pay higher rates than would otherwise be the case. In other words, to the extent that the Government fails to pay its fair share of the transportation burden the general shipping public has to make up the difference."

Like illustrations could be multiplied, but the foregoing suffice

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*Hearings, Subcommittee of the Senate Committee on Interstate Commerce, 78th Cong., H. R. 4184, pp. 4-5. Congress did not enact H. R. 4184, but in the 79th Congress land-grant rates were finally abolished through enactment of H. R. 694, Pub. No. 256.

to show the remedial nature of legislation such as Section 321(a), which abolished land-grant deductions in respect of all government property except military property for military use.

This Court has frequently emphasized the rule that an exception contained in a remedial statute should be strictly construed and should be interpreted so as not to destroy the remedial processes intended to be accomplished by the enactment.

The leading case is *Spokane & I. E. R. Co.* v. *United States*, 241 U.S. 344, 350, 36 S. Ct. 668, 671, 60 L. Ed. 1037. That was an action by the United States to recover penalties for violation of the Safety Appliance Act. The defense was that the cars involved were operated over street railway tracks from the stations in Spokane to the yards of the company, and were therefore "used upon street railways," within the meaning of an exception rendering the requirements for safety appliances inapplicable to cars so operated. The operation, however, was continued over the interurban section of the railroad, to which the Act would apply. This Court held that to sustain the defense would require an unwarranted extension of the meaning of the exception and would tend to defeat the purpose of the Act. The Court said (p. 350):

> "But to so treat the act would be in plain disregard of the elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed; that is, should be so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment."

The principle thus enunciated has been followed in numerous cases.

Piedmont & Northern Rwy. Co. v. *Interstate Commerce Commission*, 286 U.S. 299, 311, 312, 52 S. Ct. 541, 545, 76 L. Ed. 1115, is peculiarly in point. It involved the interpretation of an exception contained in the Transportation Act of 1920. The court held that the Transportation Act of 1920 was remedial legislation and that therefore the exception should be strictly construed. The specific question was whether the Act required the Piedmont & Northern, an electric railway, to secure the authority of the Interstate Commerce Commission before undertaking an extension of its line. The applicable provision in the Transportation Act

contained an exception in the case of electric and suburban railways. Holding the Commission's authorization to be required, this Court said:

> "The petitioner's railway is of such importance in interstate commerce and renders a service so predominantly devoted to the handling of interstate freight in connection with steam railroads, is in such relation to connecting steam carriers, and competes with steam trunk lines in such manner, that, in view of the declared policy of the act we cannot hold it an 'interurban' railway within the exemption of the same paragraph. *The Transportation Act was remedial legislation and should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended.' Spokane & I. E. R. Co.* v. *United States,* 241 U.S. 344; 60 L.Ed. 1037, 36 S.Ct. 668."

In *McDonald* v. *Thompson,* 305 U.S. 263, 266, 59 S.Ct. 176, 83 L.Ed. 164, and *Gregg Cartage Co.* v. *United States,* 316 U.S. 74, 83, 62 Sup.Ct. 932, 86 L.Ed. 1283, this Court placed a narrow construction upon exceptions contained in the Motor Carrier Act of 1935.

The case of *Pennsylvania R. Co.* v. *United States,* 54 F. Supp. 381; decided by a three-judge court consisting of Soper, Circuit Judge, and Coleman and Chesnut, District Judges, involved construction of the Transportation Act of 1940. The court held that the Act was remedial legislation and that exceptions from its broad purpose and intent should be strictly construed, saying (p. 390):

> "Finally, we feel we scarcely need say more to make it clear that the Transportation Act of 1940 is very broad, remedial legislation. For this reason, as the Supreme Court has said about the Transportation Act of 1920, it should be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended.' *Piedmont & Northern Railway Co.* v. *Interstate Commerce Commission,* 286 U.S. 299, 311, 312, 52 S. Ct. 541, 545, 76 L. Ed. 1115. See also *McDonald* v. *Thompson,* 305 U.S. 263, 266, 59 S.Ct. 176, 83 L.Ed. 164; *Gregg Cartage Co.* v. *United States,* 316 U.S. 74, 83, 62 S.Ct. 932, 86 L.Ed. 1283."

The foregoing cases and the history of land-grant rates demonstrate that the Transportation Act of 1940, as a whole *and as abolishing land-grant deductions,* was remedial legislation. In respect of land-grant repeal, its primary purposes were clearly remedial—namely, relief for the railroads from recognized hardship and injustice and an end, *pro tanto,* to discrimination. This Court, accordingly, in applying the exception upon which the United States relies, should construe the same strictly and confine its application to what is "military or naval property of the United States moving for military or naval and not for civil use" in the narrowest sense of the words used.

THE AUTHORITIES RELIED UPON BY PETITIONER. —As stated, Petitioner relies upon *Southern Pacific Co.* v. *United States,* 307 U.S. 393, *Great Northern Ry. Co.* v. *United States,* 315 U.S. 262, *Slidell* v. *Grandjean,* 111 U.S. 412, and *Southern Ry. Co.* v. *United States,* 322 U.S. 72, in support of its contention for a liberal interpretation of the exception in Section 321(*a*): Cf. Petitioner's Brief, p. 104. It remains, in answer, to add a word regarding those cases.

Southern Pacific Company v. *United States* and *Great Northern Ry. Co.* v. *United States* announce the familiar doctrine that relinquishment of a public right is ordinarily to be construed liberally in favor of the Government and strictly against the donee. The reasons upon which this doctrine rests are made clear in *Slidell* v. *Grandjean,* and, as we shall show, they are inapplicable in the instant case.

The *Slidell* case involved a determination of the extent of a grant of public land to a private individual, apparently without consideration as to the portion in dispute. This Court referred to the "familiar rule of construction that where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, and there is doubt as to the meaning of its terms, or as to its general purpose, that construction should be adopted which will support the claim of the Government rather than that of the individual." The Court stated that the reason for the rule is to be found in the circumstance that such acts are

usually drawn by the interested parties, who will be presumed to claim all they are entitled to. "The rule," said the Court, "is a wise one; it serves to defeat any purpose concealed by skillful use of terms, to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies."

In *Russell* v. *Sebastian,* 233 U.S. 195, 205, 58 L.Ed. 912, 921, 922—a case involving the extent of a public utility's right to lay gas and water mains in city streets pursuant to acceptance of an offer tendered by constitutional provision—Mr. Justice Hughes, after stating the principle of the *Slidell* case, commented as follows:

> "But it must also be recognized that this principle of construction does not deny to public offers a fair and reasonable interpretation, or justify the withholding of that which it satisfactorily appears the grant was intended to convey (citing cases). Here, the provision was presented by a constitutional convention for adoption by the people as the deliberate expression of the policy of the state in order to secure the benefits of competition in public service, and it will not be questioned that it must receive, as the state court said in *People* v. *Stephens,* 62 Cal., p. 233, 'a practical, common-sense construction.'"

The reason behind the doctrine of the *Slidell* case, as stated in that decision itself and reiterated by the Chief Justice in *Russell* v. *Sebastian, supra,* is the circumstance that a statute operating as a public grant to a private person is ordinarily drawn by the donee, who will be presumed to claim in no uncertain terms all he is entitled to. The reason for the rule is wholly absent in the present case, and the rule itself is therefore without application. The language in Section 321(a) which benefits the carriers is the explicit provision that

> "Notwithstanding any other provision of law * * * the full applicable commercial rates * * * shall be paid for transportation by any common carrier subject to the Act of any property for the United States, or on its behalf."

It will not be denied that this language, standing alone, explicitly abolishes any and all land-grant deductions. If it be

attributed to carrier authorship, it unmistakably covers all that to which the carriers could be entitled in the premises. The ensuing language of Section 321(a), embodying the exception whereby land-grant deductions are preserved in respect of military property moving for military and not for civil use, is, on the other hand, distinctly not designed for carrier benefit. Its authorship is not to be attributed to the carriers. It apparently originated with the United States (see *ante*, pp. 32-3). On the theory of the *Slidell* and like cases, it should be construed strictly against the United States as being of its authorship and for its benefit. The United States should be taken to have clearly provided the full extent of the exception. Therefore, should there be found an ambiguity, it ought to be resolved against the United States. For certainly the prime motive in the enactment of Section 321(a), and its dominating purpose, was to relieve the railroads of the burden of half-rates for the United States. The exception should not be permitted to defeat the principal purpose in mind, as would surely result in time of national peril or war under Petitioner's contention. Such, in the words of Chief Justice Hughes, is the "practical common-sense construction."

Southern Ry. Co. v. United States, supra (cited by Petitioner, Brief pp. 53, 55, 104, 108), involved the interpretation of an equalization agreement entered into between the Southern Railway and the United States. The contract expressly entitled the United States to "the lowest net rates lawfully available, as derived through deductions account of land-grant distances from the lawful rates filed with the Interstate Commerce Commission applying from point of origin to destination at time of movement." The question was whether or not the United States was entitled to compute the deduction on the basis of land-grant distances via a circuitous as opposed to a more direct and more practicable land-grant route. It was held that the United States might calculate upon the more circuitous distance, because that would produce "the lowest net rate lawfully available." The Court pointed out that certain other equalization agreements expressly excluded the use of circuitous land-grant mileage and that for it, by construction, to supply that provision in the particular agreement under consideration would be to remake rather than to interpret the

contract. Thus the case was simply one where the Court declined to modify a contract through construction. It is not apposite here.

VIII.

THE CIRCUMSTANCES SURROUNDING THE ENACTMENT OF SECTION 321 (a), AND THE SIGNIFICANCE OF THE WORDS "AND NOT FOR CIVIL USE."

As we have sought to show, there is implicit in Petitioner's argument the proposition that conditions of total war operate to obliterate any distinction between what is civil, on the one hand, and military, on the other. Our reply is that total war emphasizes rather than obliterates the distinction. At all events, it is certain that Congress in the enactment of Section 321(a) of the Transportation Act of 1940 regarded the distinction as a continuing one and expressly provided that it be given effect. No other conclusion would allow any significance to the phrase "and not for civil use." This aspect of the case was dealt with by the District Court, as follows (60 F. Supp. 433, 438; R. 24-5):

> ". . . It is urged that in waging modern warfare all resources of a country are mobilized and articles heretofore considered as non-military assume such character in conducting what has been termed 'total war.' England has been likened to a besieged fortress and it is contended that such assistance as was rendered that country was assistance in carrying on the war in a military sense. . . .
>
> "This line of reasoning, if followed to its logical conclusion, would obliterate any distinction between the civilian and the military in time of war.
>
> "In adopting the language of the Transportation Act, Congress recognized a distinction between military or naval property and other property of the Government and it recognized the distinction between military or naval property moving for military or naval use and such property for civil use. As has been pointed out, the Act was passed at a time when there existed a threat of involvement of this country in total war on a world-wide stage, the serious nature of which is realized when it is recalled that the threat resulted in an accomplished fact within less than fifteen months from

the time Congress acted. The United States along with the world, was a close observer of the methods of waging 'total war' and Congress was fully aware that modern wars engage the full resources of belligerent nations. Nevertheless, the Act clearly recognizes the distinction between the civil and the military. Appropriate language might have been used basing the exception upon the existence of a state of war, but this was not done."

In the same connection, the Circuit Court of Appeals said, 152 F. (2d) 228, 229; R. 31-2:

"The Transportation Act was passed before the Lend-Lease Act. Sympathies in this country then ran strongly against the Axis powers; it was pretty generally agreed that we should help the enemies of the Axis; there was real fear that the United States might become involved in the conflict; swift measures for defense had to be perfected on an extremely wide scale. Yet, with this picture before it, we must presume that Congress deliberately used the words 'military or naval' in their generally accepted meaning. And we cannot accept Government's statement that the words 'not for civil use' in the Transportation Act were mere surplusage. On the contrary, we think those words clearly show a distinction (however difficult in practice) between the military or naval on the one hand, and the civil on the other hand. Had this not been the Congressional intention, appropriate words for that purpose were readily available."

We submit that there is no escape from the logic of the opinions below and that Petitioner's position is not tenable.

IX.

PETITIONER'S ARGUMENT BASED UPON THE LAW OF CONTRABAND

In Petitioner's Brief, pp. 45-8, the attempt is made to bolster the case for the United States by reference to the law of contraband. Regardless of the extent to which the concept of contraband may have expanded as modern war has come to involve the civilian population and civilian occupations as well as the military establishment, no light is shed upon the question here before the Court.

As the home front acquired the degree of importance attaching to it in modern warfare contraband may have come to include commodities essential to civilian subsistence and civilian occupations. If agricultural fertilizer destined to an enemy country would properly be deemed contraband, by the same token so would anything else deemed helpful to the enemy, whether for civilian or military use. We submit, therefore, that Petitioner's resort to the contraband concept clearly begs the question in this case. Admittedly the fertilizer was useful in Britain's war effort. But the question is not whether the fertilizer would aid England, but whether its use was civil or military. On this point the law of contraband sheds no light whatever.*

X.

PETITIONER'S ARGUMENT BASED UPON THE LEGISLATIVE HISTORY OF LAND GRANT REPEAL

Petitioner (Brief, pp. 75-79) seeks to draw support from Congressional unwillingness to abolish the land grant rates preserved by the exception in Section 321(a) until hostilities ended. But it does not follow from retention of land grant rates during the war on "military or naval property of the United States moving for military or naval and not for civil use" that Congress contemplated application of land grant deductions to the movement of agricultural property for agricultural use. Patently, we have here a *non sequitur*. The argument begs the question in the case.

A correlative argument is advanced on page 83 of Petitioner's Brief, where it is said that "a basic purpose of Congress, in enacting Section 321(a), was to continue the railroads' land-grant obligations for national defense purposes." As related to the con-

*In a footnote to its argument based upon the law of contraband, Petitioner (Brief, p. 45) notes that "phosphates are also a key ingredient in the production of many types of munitions, including tracer bullets and flares, grenades and bombs." It is difficult to perceive the point of this note in view of the agreed and conclusive showing of intended and actual agricultural use of the shipments here involved. The District Court, not to be confused, said in this connection (60 F. Supp. 433, 437; R. 23):

> "While phosphate rock and superphosphate may be used for various purposes, it is stipulated that the shipment here involved was destined for use as agricultural fertilizer supplied to farmers in Great Britain under the Lend-Lease Act * * *."

ception of "national defense" embodied in the Lend-Lease Act, this assertion is entirely unfounded. Here, again, Petitioner begs the question. Moreover, as already shown, *ante* pp. 44-5, the circumstances surrounding the enactment of Section 321(a), and the express exclusion of land-grant deductions on property moving for "civil use" show conclusively that Congress did not contemplate a latitudinarian interpretation of "military property" moving for "military use."

XI.

SUMMARY

The case for respondents may be briefly summarized as follows:

1. There is no dispute as to the validity of the claim sued upon. The only defense asserted is by way of counterclaim. The counterclaim rests upon the proposition that certain shipments over the Seaboard of phosphate rock and superphosphate which moved for export to England under the lend-lease program were entitled to land-grant deductions from the full commercial rates. The respondents deny that the shipments in question were entitled to move subject to land-grant deductions.

2. Land-grant deductions originated by way of condition upon governmental grants of land from the public domain. With passage of time the railroads, through land-grant deductions from commercial rates, paid many times over for the land granted. In the light of this consideration, coupled with unanticipated growth in the volume and variety of governmental rail shipments and aggravation of the discrimination involved, the inequity of continued insistence upon reduced rates for governmental traffic became apparent. Accordingly, Section 321(a) of the Transportation Act of 1940 was enacted. It abolished land-grant deductions in respect of all governmental traffic, excepting only shipments of "military or naval property of the United States moving for military or naval and not for civil use." It is agreed that the shipments of phosphate rock and superphosphate there involved were, at the time of their transportation over the Seaboard, property of the United States. Therefore, the issue in

this case comes down to the question whether or not such shipments constituted "military or naval property" of the United States "moving for military or naval and not for civil use," within the meaning of the exception contained in Section 321(a) of the Transportation Act of 1940.

3. The burden of proof to sustain its counterclaim rests upon the United States. 31 C. J. S. 714. Overall relief from the burden of land-grant deductions was a remedial measure, to be liberally construed. Therefore, the scope of the exception whereby such relief was denied in respect of military property of the United States moving for military and not for civil use is to be narrowly construed against the United States.

4. The only proof in support of the counterclaim is the stipulated fact that the shipments of phosphate rock and superphosphate moved for export under the lend-lease program. As to both the phosphate rock and the superphosphate, it is stipulated that they were requisitioned, transported, exported and used as agricultural fertilizer, in aid of Great Britain's program of intensified food production. Therefore, as to both materials, the question is whether the bare fact that they moved for export as lend-lease material is enough to override proof of intended use as agricultural fertilizer and establish that they nevertheless constituted (a) military property (b) moving for military and not for civil use.

5. The bare fact of exportation under the lend-lease program fails to establish, or even to indicate, that the shipments constituted military property moving for military and not for civil use. The term "defense article," as defined in the Lend-Lease Act, embraced every known variety of material susceptible of any kind of use in either immediate or indirect support of the total war effort of any country whose defense the President deemed vital to the defense of the United States, including distinctly civilian property for demonstrably civil use. This is conclusively shown (a) by the language employed in the Act itself to define defense articles; (b) by the practical construction consistently placed upon the statutory definition by the Executive Department charged with administration of the Act; and, (c) by the affirmative approval and adoption by Congress of that practical construc-

tion, as evidenced by repeated appropriation of billions of dollars for continued administration of the Act as construed by the Executive Department.

6. The case would thus clearly be with the respondents even under the most liberal construction consistent with the language of the exception contained in Section 321(a). In view of the burden resting upon the United States to bring the shipments in question within the purview of that exception strictly construed, it is clear, *a fortiori*, that the counterclaim must fail.

XII.

CONCLUSION

Petitioner having failed to establish its counterclaim, the judgment below should be affirmed.

Respectfully submitted,

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Norfolk, Virginia,
December 27, 1946.

APPENDIX A

THE LEND-LEASE ACT

[Public Law 11—77th Congress]
[Chapter 11—1st Session]
[H. R. 1776]

AN ACT

Further to promote the defense of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as "An Act to Promote the Defense of the United States."

Sec. 2. As used in this Act—

(a) The term "defense article" means—

(1) Any weapon, munition, aircraft, vessel, or boat;

(2) Any machinery, facility, tool, material, or supply necessary for the manufacture, production, processing, repair, servicing, or operation of any article described in this subsection;

(3) Any component material or part of or equipment for any article described in this subsection;

(4) Any agricultural, industrial or other commodity or article for defense.

Such term "defense article" includes any article described in this subsection: Manufactured or procured pursuant to section 3, or to which the United States or any foreign government has or hereafter acquires title, possession, or control.

(b) The term "defense information" means any plan, specification, design, prototype, or information pertaining to any defense article.

Sec. 3. (a) Notwithstanding the provisions of any other law, the President may, from time to time, when he deems it in the

interest of national defense, authorize the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government—

(1) To manufacture in arsenals, factories, and shipyards under their jurisdiction, or otherwise procure, to the extent to which funds are made available therefor, or contracts are authorized from time to time by the Congress, or both, any defense article for the government of any country whose defense the President deems vital to the defense of the United States.

(2) To sell, transfer title to, exchange, lease, lend, or otherwise dispose of, to any such government any defense article, but no defense article not manufactured or procured under paragraph (1) shall in any way be disposed of under this paragraph, except after consultation with the Chief of Staff of the Army or the Chief of Naval Operations of the Navy, or both. The value of defense articles disposed of in any way under authority of this paragraph, and procured from funds heretofore appropriated, shall not exceed $1,300,000,000. The value of such defense articles shall be determined by the head of the department or agency concerned or such other department, agency or officer as shall be designated in the manner provided in the rules and regulations issued hereunder. Defense articles procured from funds hereafter appropriated to any department or agency of the Government, other than from funds authorized to be appropriated under this Act, shall not be disposed of in any way under authority of this paragraph, except to the extent hereafter authorized by the Congress in the Acts appropriating such funds or otherwise.

(3) To test, inspect, prove, repair, outfit, recondition, or otherwise to place in good working order, to the extent to which funds are made available therefor, or contracts are authorized from time to time by the Congress, or both, any defense article for any such government, or to procure any or all such services by private contract.

(4) To communicate to any such government any defense information, pertaining to any defense article furnished to such government under paragraph (2) of this subsection.

(5) To release for export any defense article disposed of in any way under this subsection to any such government.

(b) The terms and conditions upon which any such foreign government receives any aid authorized under subsection (a) shall be those which the President deems satisfactory, and the benefit to the United States may be payment or repayment in kind or property, or any other direct or indirect benefit which the President deems satisfactory.

(c) After June 30, 1943, or after the passage of a concurrent resolution by the two Houses before June 30, 1943, which declares that the powers conferred by or pursuant to subsection (a) are no longer necessary to promote the defense of the United States, neither the President nor the head of any department or agency shall exercise any of the powers conferred by or pursuant to subsection (a); except that until July 1, 1946, any of such powers may be exercised to the extent necessary to carry out a contract or agreement with such a foreign government made before July 1, 1943, or before the passage of such concurrent resolution, whichever is the earlier.

(d) Nothing in this Act shall be construed to authorize or to permit the authorization of convoying vessels by naval vessels of the United States.

(e) Nothing in this Act shall be construed to authorize or to permit the authorization of the entry of any American vessel into a combat area in violation of section 3 of the Neutrality Act of 1939.

Sec. 4. All contracts or agreements made for the disposition of any defense article or defense information pursuant to section 3 shall contain a clause by which the foreign government undertakes that it will not, without the consent of the President, transfer title to or possession of such defense article or defense information by gift, sale, or otherwise, or permit its use by anyone not an officer, employee, or agent of such foreign government.

Sec. 5. (a) The Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government involved shall, when any such defense article or defense

information is exported, immediately inform the department or agency designated by the President to administer section 6 of the Act of July 2, 1940 (54 Stat. 714), of the quantities, character, value, terms of disposition, and destination of the article and information so exported.

(b) The President from time to time, but not less frequently than once every ninety days, shall transmit to the Congress a report of operations under this Act except such information as he deems incompatible with the public interest to disclose. Reports provided for under this subsection shall be transmitted to the Secretary of the Senate or the Clerk of the House of Representatives, as the case may be, if the Senate or the House of Representatives, as the case may be, is not in session.

Sec. 6. (a) There is hereby authorized to be appropriated from time to time, out of any money in the Treasury not otherwise appropriated, such amounts as may be necessary to carry out the provisions and accomplish the purposes of this Act.

(b) All money and all property which is converted into money received under section 3 from any government shall, with the approval of the Director of the Budget, revert to the respective appropriation or appropriations out of which funds were expended with respect to the defense article or defense information for which such consideration is received, and shall be available for expenditure for the purpose for which such expended funds were appropriated by law, during the fiscal year in which such funds are received and the ensuing fiscal year; but in no event shall any funds so received be available for expenditure after June 30, 1946.

Sec. 7. The Secretary of War, the Secretary of the Navy, and the head of the department or agency shall in all contracts or agreements for the disposition of any defense article or defense information fully protect the rights of all citizens of the United States who have patent rights in and to any such article or information which is hereby authorized to be disposed of and the payments collected for royalties on such patents shall be paid to the owners and holders of such patents.

Sec. 8. The Secretaries of War and of the Navy are hereby authorized to purchase or otherwise acquire arms, ammunition, and implements of war produced within the jurisdiction of any country to which section 3 is applicable, whenever the President deems such purchase or acquisition to be necessary in the interests of the defense of the United States.

Sec. 9. The President may, from time to time, promulgate such rules and regulations as may be necessary and proper to carry out any of the provisions of this Act; and he may exercise any power or authority conferred on him by this Act through such department, agency, or officer as he shall direct.

Sec. 10. Nothing in this Act shall be construed to change existing law relating to the use of the land and naval forces of the United States except insofar as such use relates to the manufacture, procurement, and repair of defense articles, the communication of information and other noncombatant purposes enumerated in this Act.

Sec. 11. If any provision of this Act or the application of such provision to any circumstance shall be held invalid, the validity of the remainder of the Act and the applicability of such provision to other circumstances shall not be affected thereby.

Approved, March 11, 1941.

APPENDIX B

LEND-LEASE REPORTS

"The President from time to time, but not less frequently than once every ninety days, shall transmit to the Congress a report of operations under this Act except such information as he deems incompatible with the public interest to disclose."

(From Section 5, subsection b, of "An Act to Promote the Defense of the United States" (Public Law No. 11, 77th Congress, 1st Session).)

IDENTIFICATION OF REPORTS TO CONGRESS UNDER THE LEND-LEASE ACT

First Report	Senate Document No. 66, 77th Congress, 1st Session
Second Report	Senate Document No. 112, 77th Congress, 1st Session
Third Report	Senate Document No. 149, 77th Congress, 1st Session
Fourth Report	House Document No. 661, 77th Congress, 2nd Session
Fifth Report	House Document No. 799, 77th Congress, 2nd Session
Sixth Report	House Document No. 839, 77th Congress, 2nd Session
Seventh Report	House Document No. 904, 77th Congress, 2nd Session
Eighth Report	House Document No. 57, 78th Congress, 1st Session
Ninth Report	House Document No. 129, 78th Congress, 1st Session
Tenth Report	House Document No. 209, 78th Congress, 1st Session
Eleventh Report	House Document No. 263, 78th Congress, 1st Session
Twelfth Report	House Document No. 353, 78th Congress, 1st Session
Thirteenth Report	House Document No. 375, 78th Congress, 2nd Session
Fourteenth Report	House Document No. 497, 78th Congress, 2nd Session
Fifteenth Report	House Document No. 616, 78th Congress, 2nd Session
Sixteenth Report	House Document No. 674, 78th Congress, 2nd Session
Seventeenth Report	Report to Congress of Foreign Economic Administrator Leo T. Crowley, dated September 25, 1944.
Eighteenth Report	House Document No. 98, 79th Congress, 1st Session
Nineteenth Report	House Document No. 189, 79th Congress, 1st Session
Twentieth Report	House Document No. 279, 79th Congress, 1st Session
Twenty-first Report	House Document No. 432, 79th Congress, 2nd Session
Twenty-second Report	House Document No. 663, 79th Congress, 2nd Session

EXTRACTS FROM REPORTS TO CONGRESS ON OPERATIONS UNDER THE LEND-LEASE ACT, MADE PURSUANT TO THE ABOVE-QUOTED PROVISION OF THE ACT:

(Italics supplied throughout)

SECOND REPORT

(p. 21) "In the case of the United Kingdom, for instance, hundreds of thousands of tons of food have gone safely across the North Atlantic to maintain the health and stamina of *British workingmen* and British soldiers. *The army of today, more than ever before, depends upon the workingmen behind the lines who produce the instruments of modern war. The American farmers have contributed much to the maintenence and expansion of*

Britain's war effort and through this to the defense of the United States."

* * * *

(p. 23) "Variety of Aid Made Available—These vessels have carried many cargoes, since the achievement of a maximum war effort requires far more in the way of supplies than merely arms and ammunition.

The supplying of essential machine tools or critical raw materials to British users may well result in 10 or 100 times their value in terms of arms and ammunition eventually finding its way to Britain's battle fronts. To this end, critical examination has been and is being made of the war effort of the entire British Empire, so that the most efficient use possible may be made of United States resources in promoting its defense *through maintaining the productive capacity of others."*

* * * *

(p. 25) "There have been shipped to the (Netherlands East) Indies from the United States arms and ammunition of all kinds; bomber, fighter, and trainer aircraft; naval boats and tanks; as well as *a wide assortment of commercial goods urgently needed for the minimum existence level of this island territory cut off from its home sources of supplies."*

THIRD REPORT

(p. 11) "Lend-Lease aid * * * includes *the raw materials and machine tools that have made it possible for the Lend-lease countries to step up their production of war material."*

* * * *

(p. 12) "Indicative of the magnitude of aid rendered thus far is the physical volume of *non-military articles* transferred."

* * * *

(p. 24) "THE FOOD FRONT.—Within recent weeks Lend-Lease foods marked 'Produce of the U. S. A.' are beginning to appear in sizable quantities *on grocers' shelves and in the kitchens of Great Britain.* Since the last report to the Congress, Lend-Lease

food has moved steadily and in increasing quantities over the bridge of ships, bringing new strength to the bodies and new hope to the minds and spirits of *the British people.*

"* * * Britain was faced a year ago with a quarter less animal protein foods than she had before the war. Had this continued, the health and the *working* and fighting efficiency of *her people* would have been undermined.

"* * * Since 1939, (British) acres under cultivation have increased from 12,000,000 to 16,000,000 and some further expansion is expected. *To aid this source of production, tractors and other farm equipment have been supplied by Lend-Lease and deliveries of seed are planned.*

* * * *

(p. 25) "Increasing quantities of Lend-Lease food shipments make themselves felt in many ways. * * * Canned meats and canned fish, because of supplies we have furnished, are now appearing on the ration lists for the first time. In the month of December, *the (English) housewife will be able to buy with one person's monthly allowance a half pound of canned meat, a quarter pound of canned fish and a pound tin of pork and beans.*"

* * * * *

(pp. 25-26) "We have made no more important contribution on the food front than our shipments of concentrated vitamins, which being small in bulk, have frequently been transported to Britain by bomber. *Supplemented by supplies of concentrated fruit juices from the United States, these vitamin shipments are largely responsible for a new project of free distribution of vitamins to children under 2 years of age. Beginning in December, over 1,300,000 small children are receiving, through maternity and child-welfare clinics and local food officers, a regular supply of concentrated orange or black-currant juice, and of cod liver oil compound.*"

FOURTH REPORT

(p. 21) "*Lend-Lease machinery and other equipment is fortifying the heavy industries and agriculture of our allies.* Ameri-

can medical supplies are helping to repair human damage done by bombings and to maintain the health of soldiers at the front. Our textiles and leathers help to clothe the military and *civil* armies fighting with us."

* * * *

(p. 22) "*Because of lend-lease demands, domestic production of Vitamin C is being expanded, and this vitamin is being supplied to British children in the form of concentrated orange juice or as an ingredient in jam.* Vitamin B-1, sometimes called the 'morale vitamin,' is sent to the United Kingdom to enrich flour."

SEVENTH REPORT

(pp. 19-20) "Our exports provide two out of every five ounces of the cheese which Britons eat and almost all their powdered milk."

* * * *

(p. 20) "We have exported a considerable percentage of our total production of canned fish to supplement the restricted meat rations of our allies' armed forces and *civilians.*"

(p. 5) "We also have another task, which will grow in magnitude as our striking power grows, and as new territories are liberated from the enemy's crushing grip. That task is to supply medicines, food, clothing, and other dire needs of those peoples who have been plundered, despoiled and starved."

(pp. 24-25) "Less than a week after our landing in North Africa, the Lend-Lease Administrator was instructed, in cooperation with General Eisenhower and the State Department, to extend aid to those areas in French Africa occupied by United Nations forces.

"The policy of the United States, already announced, is to provide food, medicines, and other necessities to alleviate the hunger and suffering of the people in any territory occupied by our forces, so far as it is humanly within our power to do so. Weapons will be furnished to the armed forces of these territories to hasten the defeat of the Axis.

"Methods of carrying out this policy will differ between areas,

and different methods may be necessary within the same area. Where commercial channels of supply have been cut off, lend-lease can be the instrument for renewing them. Where relief distribution is necessary, lend-lease can supply the materials of relief.

"Steps have already been taken with respect to North Africa in execution of this policy. About $5,000,000 worth of civilian goods have been purchased for shipment to that area. Many times that amount will be procured during the coming months, to be sent as shipping space becomes available. So long as military operations continue in this area, the amount of available shipping space cannot accurately be predicted. Cargoes necessary to maintain our armies in the field will have top priority on shipping, but civilian supply will come next on the list.

"Items purchased, or to be purchased, under this program include: Medical and hospital supplies ranging from anaesthetics to operating knives, sulfa drugs and antitoxins; sugar, powdered and evaporated milk, and cheese, to meet the most urgent food needs; cotton textiles, ready-made new and used clothing, and shoes; copper sulphate to increase the production of vegetables and fruits for the consumption of our troops as well as the inhabitants; coal for transportation and kerosene for lighting. The United Kingdom will participate in this program with the United States. * * *

"The United Nations have shown that they are capable of military teamwork of a high degree. In the field of relief and rehabilitation, they have an opportunity to develop a constructive program that will have a most direct bearing on the problems of the peace."

TENTH REPORT

(pp. 10, 12) "We have shipped more than $1,600,000,000 worth of agricultural products. Most of this has been food shipped principally to Russia, for the Soviet Army, and to Great Britain, for the British armed forces *and those on the production front who are supplying the fighting lines.*"

(pp. 17-19) "Since the invasion (of North Africa) last November, lend-lease has had a double job. In addition to the mili-

tary equipment we have sent to the United Nations forces there, *we have supplied food, clothing, medicines, and other necessities of life for the civilian population behind the lines.* These had a value of $32,205,000 up to April 1 and have been essential to the success of our military operations. Lend-Lease food and medicines are now being distributed to the people of war-torn Tunisia. The British have also sent large quantities of such supplies. We have also sent materials and equipment to aid in restoring the production of strategic and critical raw materials.

"Even though the grasp of the Axis on North Africa has now been broken, lend-lease supplies to that area are of continuing importance to the United Nations war effort. We must continue to supply munitions and war equipment to the armies of our French allies in North Africa so that they may be properly trained and equipped to play their part in the invasions to come. *We must continue, moreover, to supply the essential civilian needs of North Africa as a military and political necessity.* * * *

"In the invasion to come, lend-lease supplies will have a two-fold task; to furnish aid to the invading forces of the United Nations, *and to aid the peoples of liberated areas.* Lend-lease will continue to furnish greater and greater amounts of war supplies to the United Nations armies. *Lend-lease supplies will also be needed to assist the people of newly liberated areas to help themselves and the United Nations through restoring the production of their farms, factories and mines.*"

(p. 20) "Through the Middle East Supply Center we are helping to provide, both on a cash and a lend-lease basis, *supplies needed to prevent a breakdown of the civilian economy of Iraq, Iran, Egypt, and other countries of the region,* although most such requirements have been met by the British Commonwealth. Lend-lease munitions and materials needed for war production and transportation are also going to Turkey from the United States along with British munitions."

ELEVENTH REPORT

(p. 7) "The other United Nations produce most of the munitions and other war supplies which they use, but lend-lease pro-

vides many weapons which they are not in a position to produce themselves, food which augments their inadequate supply, and *raw materials and industrial equipment which enable them to expand their output of finished munitions and to meet essential civilian needs.*"

* * * *

(p. 24) "*Lend-lease agricultural machinery and seeds have been shipped to facilitate planting, cultivating and harvesting.*"

* * * *

(p. 26) "Food * * * is being shipped to our Allies for use by their armed forces and by their *civilians* working behind the lines. * * * Exports of food to North Africa have been decreasing, *but large amounts of seeds for planting have been sent in order to expand food production* and diminish the necessity for further food shipments."

* * * *

(p. 28) "Foods were shipped to North Africa to tide the *civilians* over until the 1943 crop could be harvested. *With the aid of more than 400,000 pounds of lend-lease seeds, large crops were planted and are already being harvested.*"

(pp. 5-6) "Except for the responsible fascist leaders, the people of the Axis need not fear unconditional surrender to the United Nations. I have said that we shall bring food for the starving and medicine for the sick in the areas liberated by the United Nations. We have done so, under lend-lease, in North Africa. We are doing so in Sicily. *We shall continue to do so in other areas, as they are liberated, to prevent economic breakdown and to aid the liberated peoples to produce and help themselves. We shall provide these necessary civilian supplies in support of our military operations and as a matter of simple humanity.*"

THIRTEENTH REPORT

(p. 8) "*Without supplementary war supplies under lend-lease, factories abroad that are producing tens of thousands of planes and guns and tanks to smash German and Japanese bases and*

production centers would have been able to contribute far less to the defeat of the enemy; and millions of men in allied lands who have marched into battle *or worked long hours in munitions plants* might not have had enough food to carry on."

* * * *

(p. 21) "We have also sent other types of concentrated foods, such as dried milk, dried fruit, concentrated fruit juices, and dehydrated vegetables. These are essential to the health of the armed forces and *workers in munitions industries,* yet require a minimum of shipping space."

* * * *

(p. 22) "Lend-lease aid to the United Kingdom has involved hundreds of special projects. For example, after studies in London and Washington revealed serious shortage of coal for future military operations and essential *civilian* requirements, lend-lease funds were made available for the purchase of relatively small amounts of *mining machinery to be used to increase production of coal in the United Kingdom.*"

FOURTEENTH REPORT

(p. 33) "In addition to food, we have sent about 9,000 tons of *seeds for the production in Russia of more food in devastated areas now reconquered and in newly developed farmlands far in the interior.*"

FIFTEENTH REPORT

(pp. 18, 20) "Shipments of food and other agricultural products to the United Kingdom have been of vital importance to *British war production* and British fighting power. * * * Coupled with a great increase in Britain's home food production they have made it possible for the *war workers* and fighting forces of the British Isles to have enough to eat to sustain an intensive war effort that is now in its fifth year."

* * * *

(p. 30) "Almost two billion dollars worth of lend-lease war supplies have been shipped to the Pacific and Far East theatres for the war against Japan. Approximately three-fifths of these supplies have consisted of fighting equipment for the Australian,

New Zealand, Chinese, Dutch, British, and Indian army, air, and naval forces fighting beside the United States forces. Almost all the remaining shipments have consisted of *industrial materials and products for the production of fighting equipment, food, and strategic raw materials in Australia, New Zealand and India.*"

(p. 38) "Civilian supplies shipped to French Africa under lend-lease are paid for at full landed cost. With the help of these shipments production of food and other materials needed for the United Nations war effort is being increased. *We have sent to Tunisia and Morocco, for example, equipment to increase production at the phosphate mines. The fertilizer produced by these mines is needed both for the United Kingdom's intensive food-production program and for the restoration of food production in the liberated areas of occupied Europe.* Seeds, insecticides, farm tools, parts for agricultural machinery, binder twine and other supplies have been sent to increase the production in North Africa of food needed by our forces. Railroad equipment has been sent to West Africa and Equatorial Africa so that greater quantities of peanut and palm oils, cocoa, mahogany, tin, copper, jute and other strategic materials and commodities needed by the United Nations can be brought out from the interior to the coast."

SIXTEENTH REPORT

(p. 9) "And *the British workers who built the plane* and the R.A.F. crew that flew it against the Germans got enough to eat because lend-lease food was included in their rations."

* * * * *

(p. 25) "With this additional food from us, the British have been able to maintain the rations of their *war workers*, at a level considerably lower than ours, but still sufficient for working efficiency."

* * * * *

(p. 30) "*To assist the Soviet people in the production of their own foods*, particularly in the recently liberated Ukraine, and to relieve their dependence on outside sources, we have also shipped 17,000 tons of *seeds* since lend-lease to Russia began."

SEVENTEENTH REPORT

(p. 9) "Friendly *non-belligerent* countries have been supplied from the United States with the minimum quantities of *consumer and industrial goods required to enable them in turn to supply other commodities essential for allied war production.*"

* * * *

(p. 26) "Military equipment for lend-lease is supplied by the War and Navy Departments. *Foodstuffs, industrial materials and equipment and other non-military lend-lease goods* are supplied by the Foreign Economic Administration, with the aid of the Treasury Department and the War Food Administration in domestic procurement and with the aid of the War Shipping Administration in arranging for transportation."

* * * *

(p. 39) *"While a major part of lend-lease exports has consisted of military equipment, lend-lease has also introduced to countries all over the world thousands of other American products—from trucks and machine tools to packaged foods—in a volume and variety never approached before. After the war the people of many countries will want to continue to obtain these and similar products from us by buying them."*

(p. 12) EIGHTEENTH REPORT

LEND-LEASE TRANSFERS OF INDUSTRIAL MATERIALS AND PRODUCTS

Cumulative from March 11, 1941 to December 1, 1944
Thousands of Dollars

CATEGORY	AMOUNT
Signal Equipment, Supplies and Materials	$ 733,611
Quartermaster Equipment, Supplies and Materials	616,035
Chemical Warfare Equipment	213,209
Engineer Equipment, Supplies and Materials	454,926
Medical Equipment, Supplies and Materials	80,374
Supplies for Servicing of Vessels	159,422
Equipment, Materials, and Supplies for Naval and Military Bases	244,293
Chemicals	194,719
Metals and Minerals	1,606,786
Railroad and Roadbuilding Equipment, Materials and Supplies	316,633
Machine Tools, Foundry Equipment, and other War Production Equipment	1,040,695
Agricultural Implements	51,103
Miscellaneous Items	524,699
TOTAL INDUSTRIAL MATERIALS AND PRODUCTS	$6,397,588

(pp. 12-13) "Industrial raw materials and equipment for war production have enabled our allies to make the actual weapons of war in their own factories. Lend-Lease materials and equipment are used to fill critical deficits in the war production of our allies. By sending them alloys, for example, we enable them to use their own iron to make steel. By sending them tools, we enable them to use this steel to make tanks and guns. What the arsenals of our allies produce relieves to that extent the strain upon our own resources and manpower in the United States."

Nineteenth Report

(p. 41) "Total shipments of horseshoe nails during the entire year of 1943 to French North and West Africa constituted less than a single month's production in the United States. This was also the case during 1944. The amounts sent were far from adequate to meet the needs for horseshoe nails in these countries *which were important sources of agricultural supplies during this period for our troops in Africa and southern Europe.*"

"The farms along the coastal plain in North Africa and in the plateau region in Tunisia and eastern Algeria before the war were as modern as farms in the United States. Over 50 per cent of the crops in North Africa were produced by the French colonists who owned large parcels of land and used American machinery and American methods. The *combines* we have shipped have served as replacements for pre-war equipment which was worn out or destroyed in the war. All lend-lease farm machinery sent to this area is paid for in full by the French."

SUPREME COURT OF THE UNITED STATES

Nos. 56 and 57.—October Term, 1946.

The United States of America, Petitioner, v. Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of the Properties and Assets of Seaboard Air Line Railway Company.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.
The United States of America, Petitioner, v. Atlantic Coast Line Railroad Company.	

56

57

[March 3, 1947.]

Mr. Justice Douglas delivered the opinion of the Court.

These cases involve controversies between the United States and respondent carriers over the transportation charges for shipments of government property in 1941. In one case phosphate rock and superphosphate are involved; in the other, phosphate rock. In both the commodities were purchased by the United States, shipped on government bills of lading over the lines of respondents, and consigned to the British Ministry of War Transport. They were exported to Great Britain under the Lend-Lease Act of March 11, 1941, 55 Stat. 31, 22 U. S. C. Supp. I, § 411 *et seq.*, for use as farm fertilizer under Britain's wartime program for intensified production of food. It is agreed that these shipments were "defense articles" as defined in § 2 of that Act.[1]

[1] The term includes "Any agricultural, industrial or other commodity or article for defense."

Respondents billed the United States for transportation charges on these shipments at the commercial rate and were paid at that rate. The Seaboard is a land-grant railroad. The Atlantic Coast Line is not; but it entered into an equalization agreement with the United States in 1938 under which it agreed to accept land-grant rates for shipments which the United States could alternatively move over a land-grant road.[2] The General Accounting Office excepted to these payments on the ground that land-grant rates were applicable. The amounts of the alleged overpayments were deducted from subsequent bills concededly due by the United States. Respondents thereupon instituted suits under the Tucker Act, 36 Stat. 1091, 1093, as amended, 28 U. S. C. § 41 (20), to recover the amounts withheld. The United States counterclaimed for the difference between the amounts due under the commercial rate and those due under the land-grant rate and asked that the difference be set off against the claims of respondents and that the complaints be dismissed. The District Courts gave judgment for respondents. The Circuit Court of Appeals affirmed. 152 F. 2d 228, 230. The cases are here on petitions for writs of certiorari which we granted because of the importance of determining the controlling principle for settlement of the many claims of this character against the Government.

For years the land-grant rate was fifty per cent of the commercial rate and was applicable to the transportation of property or troops of the United States. 43 Stat. 477,

[2] The points from which the phosphate was moved by the Atlantic Coast Line are also stations on the Seaboard Line. Hence the United States is entitled to secure land-grant deductions from the Atlantic Coast Line if the Seaboard would have been subject to land-grant rates on those articles.

Since the land-grant rates were substantially lower than the commercial rates, roads which competed with the land-grant lines were unable to get the government business. For that reason they entered into equalization agreements. *See Southern Ry. Co. v. United States*, 322 U. S. 72, 73–74.

486, 10 U. S. C. § 1375; *United States* v. *Union Pacific R. Co.*, 249 U. S. 354, 355; *Southern Ry. Co.* v. *United States*, 322 U. S. 72, 73. A change was effected by the Transportation Act of September 18, 1940, 54 Stat. 898, 954, 49 U. S. C. § 65. See *Krug*, v. *Santa Fe Pac. R. Co.*, 329 U. S. —. All carriers by railroad which released their land grant claims against the United States[3] were by that Act entitled to the full commercial rates for all shipments, except that those rates were inapplicable to the transportation of "military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty . . ." § 321 (a).[4] The Seaboard filed such a release. Accordingly, the question presented by these cases is whether the fertilizer was "military or naval property of the United States moving for military or naval and not for

[3] Section 321 (b).

[4] This provision was eliminated from § 321 (a) by the Act of December 12, 1945, 59 Stat. 606, 49 U. S. C. Supp. V, § 65 (a). Section 2 of that Act made October 1, 1946, the effective date of the amendment but provided that "any travel or transportation specifically contracted for prior to such effective date shall be paid for at the rate, fare, or charge in effect at the time of entering into such contract of carriage or shipment."

Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce, who had charge of the bill on the floor, made the following statement concerning pending controversies of the nature involved in the instant cases:

> "Now, Mr. President, I wish to repeat what I said a moment ago. It should be made perfectly clear that the passage of this bill resulting in the repeal of the land-grant rates will have no effect whatever upon the controversies as to the proper classification of this material, provided it has moved prior to the effective date of the act. These controversies, which were discussed extensively at the hearings, will have to be settled by the courts; and action on the present bill, if favorable, will have no effect whatever upon the question of whether materials that have moved prior to the repeal fall within or without the classification of military or naval property." 91 Cong. Rec. p. 9237.

civil use" within the meaning of § 321 (a) of the Transportation Act.

The legislative history of the Transportation Act of 1940 throws no light on the scope of the except clause.[5] But it is apparent from the face of the statute that there are important limitations on the type of property which must be carried at less than the applicable commercial rates. In the first place, it is not the transportation of "all" property of the United States that is excepted but only the transportation of "military or naval" property of the United States. In the second place, the excepted property must be "moving for military or naval and not for civil use." Thus the scope of the clause is restricted both by the nature of the property shipped and by the use to which it will be put at the end of the transportation.

The bulk and main stress of petitioner's argument are based on the Lend-Lease Act which was enacted about six months after the Transportation Act. It is pointed out that in the case of every shipment under the Lend-Lease Act there was a finding by the Executive that the shipment would promote our national defense,[6] that the Act was

[5] See H. Rep. No. 2016, 76th Cong., 3d Sess., p. 87; H. Rep. No. 2832, 76th Cong., 3d Sess., p. 98. Relief from land grant deductions was urged on the basis of the financial plight of the railroads and the substantial increase in government traffic which occurred in the 1930's. See Report of President's Committee of September 20, 1938, I Hearings, House Committee on Interstate and Foreign Commerce, 76th Cong., 1st Sess., on H. R. 2531, pp. 261, 271–272; Public Aids to Transportation (1938), Vol. II, pp. 42–45. The section finally enacted appears to represent a compromise between a House Bill eliminating land-grant rates entirely (see H. Rep. No. 1217, 76th Cong., 1st Sess., p. 27) and a Senate Bill which by its silence left them unchanged. S. 2009, 76th Cong., 1st Sess.

[6] The authority was vested in the President who might, when he deemed it "in the interest of national defense," authorize the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government to lease, lend, etc., "any defense article". § 3 (a) (2).

indeed a defense measure,[7] and that unless the administration of that Act is impeached, all lend-lease "defense articles" fall within the except clause and are entitled to land-grant rates.

Under conditions of modern warfare, foodstuffs lend-leased for civilian consumption, sustained the war production program and made possible the continued manufacture of munitions, arms, and other war supplies necessary to maintain the armed forces. For like reasons, fertilizers which made possible increased food production served the same end. In that sense all civilian supplies which maintained the health and vigor of citizens at home or abroad served military functions.

So for us the result would be clear if the standards of the Lend-Lease Act were to be read into the Transportation Act. For the circumstance that the fertilizer was to be used by an ally rather than by this nation would not be controlling.

Our difficulty, however, arises when we are asked to transplant those standards into the Transportation Act. And that difficulty is not surmounted though the exception in § 321 (a) be construed, as it must be, *Northern Pacific R. Co.* v. *United States*, No. 400, decided this day, strictly in favor of the United States.

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[7] The Act was entitled "An Act to Promote the Defense of the United States"; and the interests of national defense were the standards governing its administration, as § 3 (a) (2), *supra*, note 6, makes plain. The same purpose is evident from the Committee Reports. H. Rep. No. 18, 77th Cong., 1st Sess., pp. 2, 11; S. Rep. No. 45, 77th Cong., 1st Sess., p. 2. And as President Roosevelt stated on September 11, 1941, in transmitting the Second Report under the Act, "We are not furnishing this aid as an act of charity or sympathy, but as a means of defending America. . . . The lend-lease program is no mere side issue to our program of arming for defense. It is an integral part, a keystone, in our great national effort to preserve our national security for generations to come, by crushing the disturbers of our peace." S. Doc. No. 112, 77th Cong., 1st Sess., p. VI.

In the first place, the Transportation Act, which preceded the Lend-Lease Act by only six months, provided its own standards. They were different at least in terms from the standards of the Lend-Lease Act; and they were provided at a time when Congress was much concerned with the problems of national defense. In September, 1940, when the Transportation Act was passed, Congress and the nation were visibly aware of the possibilities of war. Appropriations for the army and navy were being increased and the scope of their operations widened,[8] alien registration was required,[9] training of civilians for military service was authorized,[10] development of stock piles of strategic and critical materials was encouraged [11]—to mention only a few of the measures being passed in the interests of national defense. See 50 Yale L. J. 250. Moreover, the realities of total war were by then plain to all. Europe had fallen; militarism was rampant. Yet in spite of our acute awareness of the nature of total war, in spite of the many measures being enacted and the many steps being taken by the Congress and the Chief Executive to prepare our national defense, § 321 (a) of the Transportation Act was couched in different terms. In other parts of that Act,[12] as in many other Congressional enactments passed during the period, the exigencies of national defense constituted the standard to govern administrative action. But the standard

[8] See, for example, Act of June 11, 1940, 54 Stat. 265, 292, 297; Act of June 13, 1940, 54 Stat. 350, 377; Act of June 14, 1940, 54 Stat. 394; Acts of June 15, 1940, 54 Stat. 396, 54 Stat. 400; Act of June 26, 1940, 54 Stat. 599.

[9] Act of June 28, 1940, 54 Stat. 670, 8 U. S. C. § 451 *et seq.*

[10] Act of September 16, 1940, 54 Stat. 885, 50 U. S. C. App. § 301 *et seq.*

[11] Act of September 16, 1940, 54 Stat. 897.

[12] Thus § 1 emphasized the policy in establishing a national transportation system adequate, *inter alia*, to meet the needs "of the national defense".

written into § 321 (a) did not reflect the necessities of national defense or the demands which total war makes on an economy. It used more conventional language—"military or naval" use as contrasted to "civil" use. That obviously is not conclusive on the problem of interpretation which these cases present. But in light of the environment in which § 321 (a) was written we are reluctant to conclude that Congress meant "all property of the United States transported for the national defense" when it used more restrictive language.

In the second place, the language of § 321 (a) emphasizes a distinction which would be largely obliterated if the requirements of national defense, accentuated by a total war being waged in other parts of the world, were read into it. Section 321 (a) uses "military or naval" use in contrast to "civil" use. Yet if these fertilizer shipments are not for "civil" use, we would find it difficult to hold that like shipments by the Government to farmers in this country during the course of the war were for "civil" use. For in total war food supplies of allies are pooled; and the importance of maintaining full agricultural production in this country if the war effort was to be successful, cannot be gainsaid. When the resources of a nation are mobilized for war, most of what it does is for a military end—whether it be rationing, or increased industrial or agricultural production, price control, or the host of other familiar activities. But in common parlance, such activities are civil, not military. It seems to us that Congress marked that distinction when it wrote § 321 (a). If that is not the distinction, then "for military or naval and not for civil use" would have to be read "for military or naval use or for civil use which serves the national defense." So to construe § 321 (a) would, it seems to us, largely or substantially wipe out the line which Congress drew and, in time of war, would blend "civil" and "military" when Congress undertook to sepa-

rate them. Yet § 321 (a) was designed as permanent legislation, not as a temporary measure to meet the exigencies of war. It was to supply the standard by which rates for government shipments were to be determined at all times—in peace as well as in war. Only if the distinction between "military" and "civil" which common parlance marks is preserved, will the statute have a constant meaning whether shipments are made in days of peace, at times when there is hurried activity for defense, or during a state of war.

In the third place, the exception in § 321 (a) extends not only to the transportation of specified property for specified uses. It extends as well to "the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty . . ." That clause plainly does not include the multitude of civilians employed by the Government during the war and exclusively engaged in furthering the war effort, whether they be lend-lease officials or others.[13] Thus, the entire except clause contained in § 321 (a) will receive a more harmonious construction if the scope of "military or naval" is less broadly construed, so as to be more consonant with the restrictive sense in which it is obviously used in the personnel portion of the clause.

In sum, we hold that respondents in these cases were entitled to the full applicable commercial rate for the

[13] The provision under land-grant legislation that "troops of the United States" should be transported at half rates was held not to include discharged soldiers, discharged military prisoners, rejected applicants for enlistment, applicants for enlistment provisionally accepted, retired enlisted men, or furloughed soldiers en route back to their stations. *United States* v. *Union Pacific R. Co., supra.* The same result was reached in the case of engineer officers of the War Department who were assigned to duty in connection with the improvement of rivers and harbors. *Southern Pacific Co.* v. *United States,* 285 U. S. 240.

transportation of the fertilizer. In *Northern Pacific R. Co.* v. *United States, supra*, we develop more fully the breadth of the category of "military or naval property" of the United States "moving for military or naval . . . use". It is sufficient here to say that the fertilizer was being transported for a "civil" use within the meaning of § 321 (a), since it was destined for use by civilian agencies in agricultural projects and not for use by the armed services to satisfy any of their needs or wants or by any civilian agency which acted as their adjunct or otherwise serviced them in any of their activities.

Affirmed.

MR. JUSTICE RUTLEDGE dissents.

CLERK'S COPY

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 57

THE UNITED STATES OF AMERICA, PETITIONER

vs.

ATLANTIC COAST LINE RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 12, 1946
CERTIORARI GRANTED APRIL 29, 1946

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

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THE UNITED STATES OF AMERICA, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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3 In United States District Court, Eastern District of Virginia

Petition

Filed April 24th, 1944

To the Honorable Judge of the District Courts for the Eastern District of Virginia:

Your petitioner, with its legal principal office in Petersburg, in the State of Virginia, and in the Eastern District thereof, respectfully shows to the Court, to wit:

1. Petitioner is a corporation, duly created, organized and existing, under and by virtue of the laws of the Commonwealth of Virginia, with its legal principal office in Petersburg, Virginia, in the Eastern District thereof, and is a common carrier by railroad, engaged in the carriage of freight and passengers in interstate and intrastate commerce, operating lines of railroad in the States of Virginia, North Carolina, South Carolina, Georgia, Florida and Alabama, its northern terminus being in the City of Richmond, Virginia.

2. Petitioner's claim does not exceed the sum of $10,000.00 and is founded upon a contract with the United States Government, defendant herein, as hereinafter set out. This action is brought under paragraph 20 of Section 24 of the Judicial Code, March 3, 1911, 36 Stat. 1093 as amended in 28 U. S. Code, Section 41 (20).

3. Defendant is indebted to petitioner in the sum of $4,192.33, being unpaid balance of the sum of $12,630.40 justly due in full by defendant to petitioner for services in carriage by petitioner over its lines of railroad in the year 1942 of various carload shipments transported for defendant from Pembroke, Florida, to Norfolk, Virginia, and from Greenville Piers, N. J., to Charleston, S. C. Petitioner duly rendered bills against defendant for the amount of these charges in the sum of $12,630.40.

4 Defendant has never questioned the correctness of the rates or charges in the sum of $12,630.40 for the services in respect of which the said shipments were made, and on October 2, 1942, defendant paid petitioner the sum of $8,438.07, leaving still owing and unpaid balance of $4,192.33. The said sum of $8,438.07 was accepted by petitioner under protest and as a part payment only, and petitioner subsequently rendered its bill to defendant for the balance of the unpaid charges which defendant has withheld and which defendant still fails and refuses to pay in whole or in part.

4. Petitioner attaches to this petition, and makes a part hereof, a statement marked "Exhibit A," showing each shipment included in the claim and details of the transportation service performed as aforesaid, including references to Government accounting offices, settlements by Government checks, check numbers, receipt of Government checks in payment on account as aforesaid, amounts deducted by Government accounting officers, and reference to the lawfully published and effective tariffs filed with the Interstate Commerce Commission showing the freight rates applicable to the transportation of the shipments involved.

5. Petitioner avers that the rates and charges set forth upon said "Exhibit A" and billed against the United States Government are the correct rates and charges currently on file with the Interstate Commerce Commission and applicable on said shipments shown thereon and moving over its line of railroad.

6. Petitioner has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government; and plaintiff alleges that it has made no assignment or transfer of the aforesaid claims or balance of said indebtedness or any part thereof or interest therein.

Wherefore petitioner prays for judgment or decree against the United States of America for the sum of $4,192.33 and for such other and further relief to which it may be entitled.

5 ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

By (S.) Thomas W. Davis,
THOMAS W. DAVIS,
Wilmington, N. C.

(S.) J. M. Townsend,
J. M. TOWNSEND,
Petersburg, Va.

(S.) Collins Denny, Jr.
COLLINS DENNY, JR.,
Richmond, Va.
Counsel for Petitioner.

[*Duly sworn to by R. J. Doss, jurat omitted in printing.*]

A. C. L. R. R. Co. Bill No. 34556, 10/15/42. Government Bill of Lading No. DA-TPS 241037, 7/24/42. Origin—Tembroke, Fla. Shipper—Pembroke Chemical Company. Consignee and Destination—British Ministry of War Pransport. Notify Hampton Road Norfolk Freight Forwarders, Norfolk, Va. Route—A. C. L. R. R. direct. Commodity—Pebble Phosphate Rock. Authority for rates: Freight: A. C. L. Phosphate Rock Tariff, F. T. No. 91-27 A, I. C. C. B 3022. Wharfage and Handling: SFTB Port Charges Tariff, F. T. 326 F, I. C. C. No. 654. Alt. Agt. C. A. Spaninger's Tariff of Increased Rates and Charges No. X-148, I. C. C. 765.

Car initials and number	Weight in pounds	Weight in tons 2,240 pounds	Weight in tons 2,000 pounds	Rates		Charges			Amount paid	Date paid	Government check No.	Balance due
				Freight	Wharfage and handling	Freight	Wharfage and handling	Total				
Sou 20762	121,200	54,107	60,660	[1] $5.48	[2] 81¢ NT	$296.50	$49.09					
KCS 17469	111,100	49,598	55,550			271.80	45.00					
ACL 21439	115,100	51,384	57,550			281.58	46.61					
PRR 79604	107,900	48,169	53,950			263.97	43.7[illegible]					
NYC 102827	115,800	51,696	57,900			283.29	46.98					
NYC 181777	111,100	49,598	55,550		Wfg. 58¢	271.80	45.00					
BS346	116,500	52,009	58,250		Hdlg. 23¢	285.01	47.18					
Wab 83213	82,200	36,696	41,100			201.09	33.29					
PRR 77665	112,300	50,134	56,150		81¢	274.73	45.48					
ACL 21094	117,600	52,500	58,800			287.70	47.63					
CMO 21580	118,200	51,428	57,600			281.83	46.65					
L&N 91194	116,700	52,098	58,350			285.49	47.26					
	1,342,700	599,417	671,350			3,284.79	543.79	$3,838.58	$589.05	11/9/42	72950	$3,239.53

[1] Per ton of 2,240 pounds.
[2] Per ton of 2,000 pounds.

A. C. L. R. R. Co. Bill No. 36667, 12/5/42. Government Bill of Lading No. DA-TPS 261514, 6/1/42. Origin—Greenville Piers, N. J. (Takes New York rate). Shipper—J. D. Barry, Jr. as to car PRR 862821; S. D. Bennett as to all other cars. Consignee and Destination—British Ministry of War Transport—Iron and Steel Division, c/o Carolina Shipping Co., A/C U. S. Treasury Department, Charleston, S. C. Route—PRR, Potomac Yard, Va., R. F. & P,

Richmond, Va., and A. C. L. Commodity—Sheet Steel. Freight: T. L. T. B. Manufactured Iron and Steel Tariff F. T. No. 128 A., Agent W. S. Curlett's I. C. C. No. A 640. Wharfage and Handling: S F. T. B. Port Charges Tariff F. T. 326 F, I. C. C. No. 654. Agent W. S. Curlett's Tariff of Increased Rates and Charges No. X 148, I. C. C. A 742.

Car initials and number	Weight in pounds	Weight in tons 2,240 pounds	Weight in tons 2,000 pounds	Rates		Charges			Amount paid	Date paid	Government check No.	Balance due
				Freight	Wharfage and handling	Freight	Wharfage and handling	Total				
PRR 355982	99,680		49,990	56¢ cwt.	81¢ NT	$55s. 21	$40. 37					
PRR 862821	118,290		59,145			602. 42	47. 90					
PRR 345979	120,200		60,100			673. 12	48. 68					
PRR 318431	118,840		59,420			665. 50	48. 13					
PRR 882460	93,820		46,910			525. 39	38. 00					
PRR 323.24	119,870		59,935			671. 27	48. 55					
PRR 288188	119,130		59,565			667. 13	48. 25					
PRR 355679	119,540		59,770			669. 42	48. 42					
PRR 823697	118,080		59,040			661. 25	47. 82					
PRR 283739	120,670		60,335			675. 75	48. 87					
PRR 822884	99,790		49,895			558. 82	40. 42					
PRR 295891	99,400		49,700			556. 64	40. 26					
PRR 852878	118,440		59,220			663. 26	47. 97					
	1,465,750		733,025			8,208. 18	593. 64	$8,801. 82	$7,848. 02	2/15/43	23070	$952. 80

SUMMARY

	Balance due
A. C. L. bill No.:	
34556	$3,239. 53
36367	952. 80
	4,192. 33

WILMINGTON, N. C.,
April 3, 1944.

13 In United States District Court

Reply to amended answer and counterclaim of defendant

Filed Sept. 1st, 1944

Petitioner, for reply to the counterclaim filed by the defendant herein, says:

1. Answering paragraph 4 of the counterclaim, petitioner admits that in or about August and September, 1941, petitioner billed the defendant for the amount of $16,909.20 for freight on acid phosphate and phosphate rock shipped on commercial bills of lading, which were afterwards changed to Government bills of lading, from East Tampa, Agricola, Pierce and Brewster, Florida, consigned to the British Ministry War Transport, care of E. H. Buck, Wallace S. Building, Tampa, Florida, and that said freight charges were computed on the commercial rate.

2. Answering the allegations of Paragraph 5, petitioner admits that defendant paid the bills in the full amount claimed. The other allegations of said paragraph are denied.

3. The allegations of Paragraph 6 are denied.

4. Answering the allegations of Paragraph 7, petitioner admits that the defendant deducted the sum of $3,239.53 due petitioner on Bill No. 34556 and paid petitioner only the sum of $589.05. The other allegations of said Paragraph are denied.

5. Answering the allegations of Paragraph 8, petitioner admits that in or about September 1941 petitioner billed defendant for the amount of $6,322.82 for freight for phosphate rock shipped on commercial or Government bills of lading from Pierce, Florida, consigned to the British Ministry War Transport, care E. H. Buck, Wallace S. Building, Tampa, Florida, and said freight charges were computed at commercial rates.

14 6. Answering the allegations of Paragraph 9, petitioner admits that the defendant paid the bills in the full amount claimed. The other allegations of said Paragraph are denied.

7. The allegations of Paragraph 10 are denied.

8. Answering the allegations of Paragraph 11, petitioner admits that the defendant deducted the sum of $952.80 due on petitioner's Bill No. 36667 and paid petitioner the sum of $7,849.02. The other allegations of said Paragraph are denied.

FURTHER DEFENSE TO COUNTERCLAIM

For further defense to said counterclaim, petitioner says:

1. That the said counterclaim does not set forth facts sufficient to constitute a claim against petitioner, in that the facts set

forth in said counterclaim show upon its face that defendant has already deducted the sum of $1,192.33, the amount claimed in the counterclaim, from the amounts of the bills which petitioner rendered the defendant, and for the amount of which deduction petitioner has brought this suit.

Wherefore, petitioner prays that the said counterclaim be dismissed.

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

By: (Sgd.) Thomas W. Davis,
THOMAS W. DAVIS,
Wilmington, N. C.,

(Sgd.) J. M. Townsend,
J. M. TOWNSEND,
Petersburg, Virginia,

(Sgd.) Collins Denny, Jr.,
COLLINS DENNY, JR.,
Richmond, Virginia,
Counsel for Petitioner.

I hereby accept service of the within amended answer.

(Sgd.) JOHN V. COGBILL,
Asst. U. S. Atty.

SEPT. 1, 1944.

15 In United States District Court

[Title omitted.]

Order allowing defendant to withdraw certain pleadings formerly filed, etc.

Entered and filed September 29, 1944

This day came the United States of America, the defendant, and asks leave of Court to withdraw all pleadings heretofore filed in this cause by it, and substitute for said pleadings its answer filed in Court this day, and by consent of the plaintiff leave is hereby granted to file said answer, and the reply of the plaintiff heretofore filed herein to the defendant's counterclaim shall stand and be received as a reply to the counterclaim filed in the answer of the Government submitted to the Court this day.

(Sgd.) ROBT. N. POLLARD,
United States District Judge.

SEPTEMBER 29, 1944.

16 In United States District Court

Answer

Filed Sept. 29, 1944

The defendant, by leave of Court had and obtained this date, withdraws the answer, amended answer, and answer to the plaintiff's reply heretofore filed herein and substitutes this answer in the place thereof, and for an answer to the bill of complaint says as follows:

1. It admits the allegations as set out in paragraphs 1 and 2 of the bill of complaint.

2. It admits the allegations as set out in paragraphs 4, 5 and 6 of the bill of complaint.

3. As to paragraph 3 of the bill of complaint, the defendant admits the performance of the service in carriage as alleged, that petitioner duly rendered bills therefor, and that defendant has never questioned the correctness of the rates or charges in the sum of $12,630.40 for the services in respect of which the said shipments were made, and that it has paid petitioner the sum of $8,438.07 thereon which was accepted under protest. By reason of the facts set forth in defendant's counterclaim herein and as specifically authorized by section 322 of the Act of September 18, 1940, 54 Stat. 898, 955, Title 49, U. S. C., Section 66, defendant deducted the amount of $4,192.33, constituting the amount of overpayments to petitioner by defendant from the charges of $12,630.40, and therefore denies that it is indebted to petitioner in the amount of $4,192.33 or any part thereof.

Counterclaim

For its counterclaim, defendant alleges:

4. In or about August and September, 1941, petitioners carried on Government bills of lading and billed defendant in
17 the amount of $16,909.20 for freight on acid phosphate and phosphate rock shipped on Government bills of lading from East Tampa, Agricola, Pierce and Brewster, Florida, and consigned to the British Ministry War Transport, care of E. H. Buck, Wallace S. Building, Tampa, Florida. The petitioner's freight charges were computed at the commercial rate without benefit of land-grant deductions.

5. Defendant paid the bills in the full amount claimed, notwithstanding that the said acid phosphate and phosphate rock were intended for export, to promote the defense of the United States, under the lend-lease program, Act of March 11, 1941, Public No.

11 (55 Stat. 31) and Act of March 27, 1941, Public No. 23 (55 Stat. 53). The acid phosphate and phosphate rock were military or naval property of the United States moving for military or naval and not for civil use, and entitled to land-grant deduction (Section 321 (a) of the Transportation Act of 1940, approved September 18, 1940, 54 Stat. 898, 954, Title 49, U. S. C., Section 65 (a)).

6. By means of charges at the commercial rate the defendant overpaid the petitioner the sum of $3,239.53. Petitioners have never repaid any part of such overcharges.

7. The defendant deducted the sum of the said overpayments from the $3,828.58 due on petitioner's bill No. 34556 and Government bill of lading No. DA-TPS 241037, dated July 24, 1942, as thereunto specifically authorized by Section 322 of the Act of September 18, 1940, 54 Stat. 898, 955, Title 49, U. S. C., Section 66, and paid petitioner the balance of $589.05.

8. On or about September 1941, petitioner carried on Government bills of lading and billed defendant in the amount of $6,322.82 for freight for phosphate rock shipped on Government bills of lading from Pierce, Florida, and consigned to the British Ministry War Transport, care of E. H. Buck, Wallace S. Building, Tampa, Florida. The petitioner's freight charges were computed at the commercial rate without benefit of land grant deductions.

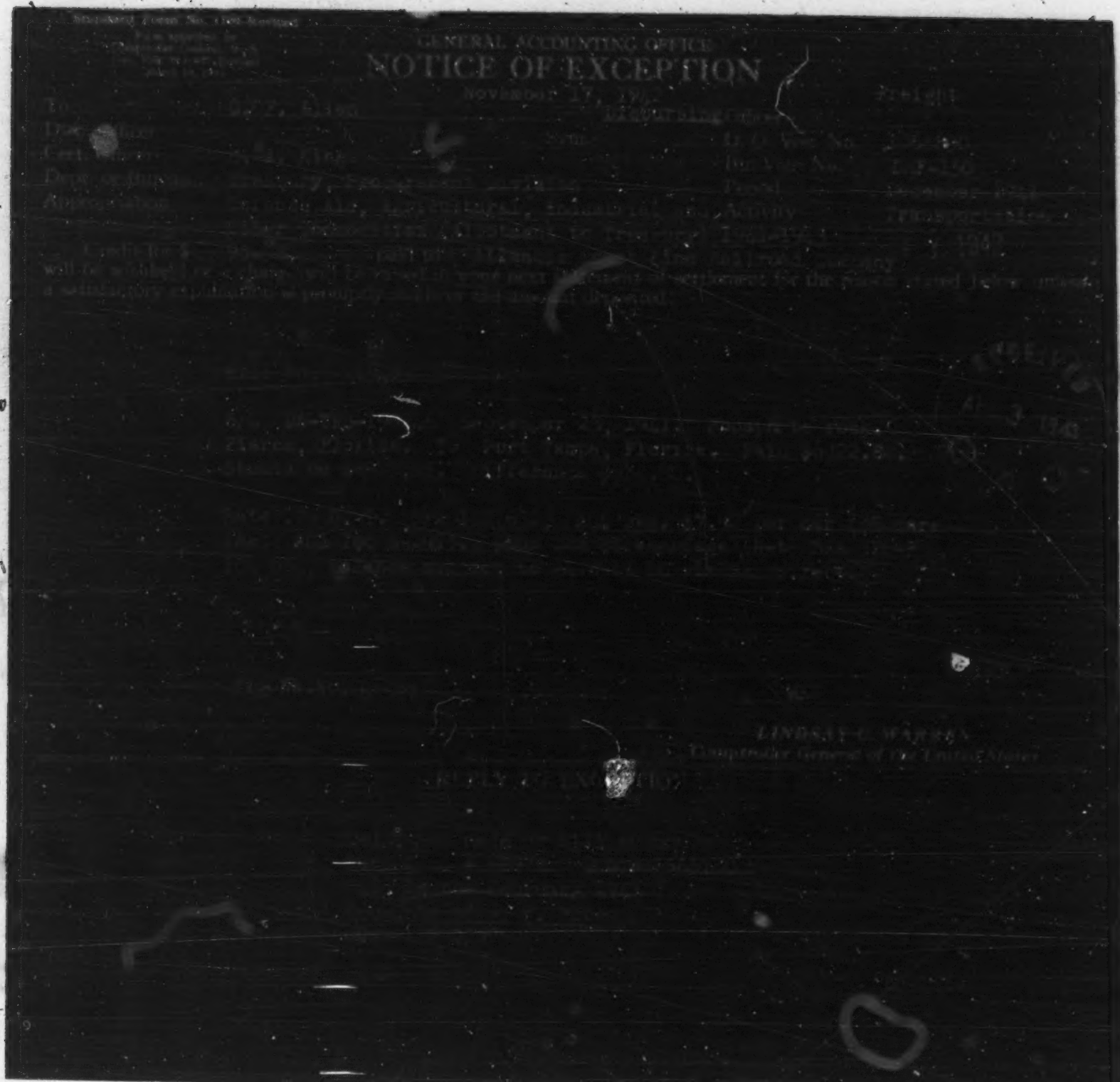
9. Defendant paid the bills in the full amount claim, notwithstanding that the said phosphate rock was intended for export, to promote the defense of the United States, under the lend-lease program, Act of March 11, 1941, Public No. 11 (55 Stat. 31), and Act of March 27, 1941, Public No. 23 (55 Stat. 53). The phosphate rock was military or naval property of the United States moving for military or naval and not for civil use, and entitled to land-grant deductions (Section 321 (a) of the Transportation Act of 1940, approved September 18, 1940, 54 Stat. 898,954, Title 49 U. S. C., Section 65 (a)).

10. By means of charges at the commercial rate the defendant overpaid the petitioner the sum of $952.80. Petitioners have never repaid any part of such overcharges.

11. The defendant deducted the sum of the said overpayments from the $8,801.82 due on petitioner's bill No. 36667 and Government bill of lading No. DA-TPS 261514, dated June 1, 1942, as thereunto specifically authorized by section 322 of the Act of September 18, 1940, 54 Stat. 898, 955, Title 49 U. S. C., Section 66, and paid petitioner the balance of $7,849.02.

Wherefore, defendant prays for judgment on its counterclaim in the amount of $4,192.33, and that said amount be set off against

EXHIBIT 13. to stipulation of facts No. 3


GENERAL ACCOUNTING OFFICE

NOTICE OF EXCEPTION

EXHIBIT 13. to stipulation of facts No. 1

Standard Form No. 1100-Revised
Form approved by
Gen. Acctg. Office
Gen. Reg. No. 49 - Revised
March 11, 1949

GENERAL ACCOUNTING OFFICE

NOTICE OF EXCEPTION

September 28, 19[illegible]

To G. F. Allen, Disbursing Officer
Disb. Officer
Cert. Officer G. A. Ring
Dept. or Bureau Treasury, Procurement Division
Appropriation Defense Aid Agricultural Industrial and Other Commodities (All pursuant to Treasury [illegible]

D. O. Vou. No.
Bu. Vou. No.
Period
Activity

Credit for $ 3259.33 paid to Atlantic Coast Line Railroad Company

will be withheld or a charge will be raised in your next statement of settlement for the reason stated below unless a satisfactory explanation is promptly made or the amount deposited.

Bill No. [illegible]

[illegible] TPS 19028[illegible], August 29, 51, [illegible]
Phosphate Rock, Florida-Points to Port Tampa, Florida [illegible]
Paid $15,280.79. Should be $12,[illegible]. Difference

[illegible] gross rate for long [illegible] applicable [illegible]
[illegible] 632) subject [illegible] switching [illegible]
request subject [illegible] reconsideration as noted below.

Origin [illegible] Rate [illegible] Amt. Paid [illegible]

[illegible]

LINDSAY C. WARREN
Comptroller General of the United States

REPLY TO EXCEPTION

Deduction made on Bill No. 34956
Dur. Vou. No. 30807 Pub. No. 272717
Paid in November 19[illegible]
Account G. F. Allen
Symbol [illegible]

EXHIBIT 11. to stipulation of facts

Standard Form No. 1081
Form approved
Comptroller General of the U.S.

(Do not write in space below name of Department or establishment and bureau, division, or office, if requested on account classification or indexing)

Public Voucher for Transportation of Freight or Express

This voucher consists of ____ sheet(s)

(Statement of account must be completely filled in before carrier signs as witness, and there must not be any erasure or alteration unless initialed or explained)

U.S. TREASURY DEPARTMENT, PROCUREMENT DIVISION, WASHINGTON, D.C.
(Department, Bureau, or Establishment)

(Accounting Classification)

Appropriations have been verified by us

SYMBOL

APPROPRIATION — AMOUNT

80-11-3008 Defense Aid, Agricultural, Industrial and Other Commodities (Allocation to Treasury - 941 - 1943.)

PAID BY

(For use of Paying Office)

THE UNITED STATES, DR.

To ATLANTIC COAST LINE RAILROAD COMPANY

Address Wilmington, N. C., 10/3/42

GRATUITOUS INSTRUCTIONS OR REVERSE HEREOF

BILL OF LADING Date, 19 42	Number	FROM / TO	CLASS	WEIGHT OR MEASUREMENT	RATE Gross	Net	AMOUNT Dollars	Cts	Items must not be split this space NOTATIONS
9/3	IFS 190219	East Tampa, Fla-Tampa, Fla	S	909000	75ET		340	88	
8/29	(IFS 190232)	Agricola, Fla-Port Tampa, Fla	S	14830900	75LT		5558	44	
8/29	(IFS 190233)								
9/11	IFS 190271	Pierce, Fla- "	S	7822900	75LT		2619	27	
9/11	IFS 190241	Agricola, Fla- "	S	8293200	75L.T.		2774	71	
9/12	IFS 190247	Brewster, Fla- "	S	15617500	75LT		5829	07	
9/3	IFS 190218	East Tampa, Fla-Tampa, Fla	S	565400	75LT		211	10	
9/4	IFS 190220	"	S	202000	75LT		75	75	

GAO RECEIVED OCT 6 1942 PROCUREMENT DIVISION

EXHIBIT 1. to stipulation of facts

Standard Form No. 1058
Form Approved by
Comptroller General U. S.
August 24, 1938

UNITED STATES OF AMERICA No. TPS-190232

Bill to Treasury Department - Procurement Division Washington, D.C.
(Department or Establishment and Bureau or Office)

SEE REVERSE HEREOF

20-111-20026 Defense Aid; Agricultural, Industrial and Other Commodities 1941-43

Inland Traffic Unit Procurement Division Tampa, Fla.

GOVERNMENT BILL OF LADING

ORIGINAL

Received from SWIFT & CO. FERTILIZER WORKS
(Name of this or Issuing Officer)

by the ATLANTIC COAST LINE RAIL ROAD
(Initial Carrier)

in apparent good order and condition (contents and value unknown), to be forwarded subject to conditions hereof as the property of the hereof, from AGRICOLA, FLA. to PORT TAMPA, FLA.
(Shipping Station) (Destination)

by the said company and connecting lines, there to be delivered in like good order and condition to THE BRITISH MINISTRY OF WAR TRANSPORT c/o E. H. BUCK WALLACE S. BUILDING TAMPA, FLA.

VIA A. C. L.
(Route to destination only when prior transportation interest of the Government is preferred thereby)

MARKS	NUMBER OF PACKAGES	NUMBER AND KIND OF PACKAGES	DESCRIPTION OF ARTICLES (Special marks and exceptions)	WEIGHTS (Subject to correction)
BULK	***	***	67 PORT DUMP- OARS PHOSPHATE ROCK. 10,968,900 Net Lbs as per attached Weigh Master's Report.	5486.8503 Long Tons

Report 33

petitioner's claim herein, and that petitioner's complaint be dismissed at his cost.

HARRY H. HOLT, Jr.,
United States Attorney.

By: (Sgd.) John V. Cogbill
JOHN V. COGBILL,
Assistant United States Attorney.

I hereby certify that a copy of this amended answer was delivered by the undersigned to Collins Denny, Jr., Esquire, counsel of record, Travelers Building, Richmond, Virginia, on the 29th day of September 1944.

(Sgd.) JOHN V. COGBILL,
Assistant United States Attorney.

10 — In United States District Court

Interrogatories addressed to defendant

Filed December 11, 1944

To the defendant, United States of America:

The following interrogatories are addressed by the plaintiff to the defendant, United States of America, which said defendant is requested to answer in writing and under oath:

First. Did the defendant charge the Government of Great Britain with the transportation, freight rates and charges from the stations of Agricola, Tierce and Brewster, Florida to Port Tampa, Florida, paid by it to plaintiff on shipments set out in the pleadings?

Second. If the defendant did not make a specific charge for such transportation, freight rates and charges on said shipments, did the defendant charge the Government of Great Britain, in addition to the cost to it of the goods, a fixed sum or percentage thereof, which included or was intended to include such transportation, freight rates and charges?

Third. If so, state what was such fixed sum or percentage.

(Sgd.) THOS. W. DAVIS,
Per C. D. Jr., *Wilmington, N. C.*

(Sgd.) COLLINS DENNY, JR.,
Richmond, Virginia.
Counsel for Plaintiff.

Legal service of above interrogatories is hereby accepted this 11th day of December 1944.

(Sgd.) H. H. HOLT, Jr.,
United States Attorney.

December 11, 1944.

41 *Exhibit No. 16*

UNITED STATES (SEAL) OF AMERICA

TREASURY DEPARTMENT

WASHINGTON

SEPTEMBER 25, 1944.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed document dated October 1, 1941, with its attachment a list of defense articles authorized for transfer to the United Kingdom by the Secretary of the Treasury) is a true copy of the Transfer Directive No. D-224-T on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

[TREASURY SEAL] (S.) (*Signature Undecipherable*),
Chief Clerk, Treasury Department.
RHF. 9123. JMD. 9/23.

Treasury Departmental Stock Form 2247.

42 Transfer Directive No. D-224-T.

THE WHITE HOUSE

WASHINGTON

OCT. 1, 1941.

MY DEAR MR. SECRETARY: By my Transfer Directives numbered 44, 63, 80, 82, 92, 97, 104, 111, 118, 127, 136, 149, 158, 179, 180, 199, and 202, dated respectively May 22, June 4, June 18, June 21, June 25, July 5, July 7, July 12, July 18, July 28, July 31, August 13, August 18, August 25, August 25, August 29, and September 4, 1941, I authorized you to transfer to the appropriate officer or representative of His Majesty's Government in the United Kingdom such quantities of the defense articles covered by the requisitions enumerated on the attached table as might become available by September 30, 1941.

I hereby authorize you to transfer to the appropriate officer or representative of His Majesty's Government in the United Kingdom all of the defense articles covered by the requisitions enumerated on the attached table.

I would appreciate it if you would arrange with the Chairman of the British Supply Council in North America for the time, method and other details of the disposition.

Sincerely yours,

FRANKLIN D. ROOSEVELT.

The Honorable THE SECRETARY OF THE TREASURY.

43 Transfer Directive No. D-224-T.
Ref. D. A. A.----------

DEFENSE ARTICLES AUTHORIZED FOR TRANSFER TO THE UNITED KINGDOM BY THE SECRETARY OF THE TREASURY

Requisition number	Articles	
	Quantity	Description
1133	435,000 short tons	Phosphate rock.
1137	50,000 long tons	Chilean Bessemer Copper or Specificable Electro in proportions to be determined.
1345	10,000 long tons	Manila hemp, assorted grades.
1367	16,000 short tons	Triple Superphosphate—to be packed in 4 ply paper bags of approximately 100 lbs. each.
1437	60,000 short tons	Calcined phosphate.
1986	17,000 short tons	Chemical Wood Pulp:
		Bleached sulphite (No hardwood pulp to be supplied) to include 6,000 tons for cordite, 1,000 tons for photo-base paper.
	13,000 short tons	Easy bleaching sulphite.
	3,000 short tons	Bleached sulphate.
	3,000 short tons	Semibleached sulphate for cordite.
	50,000 short tons	Kraft Pulp—to include 3,000 tons for cordite.
1987	8,000 short tons	Kraft liner board.
1988	6,000 short tons	(Approx. 16,000,000 sq. ft.) Hard Boards.
	4,800 short tons	(Approx. 17,000,000 sq. ft.) Insulation Boards.
	2,700 short tons	(Approx. 11,000,000 sq. ft.) Laminated Wallboards.
2016	300,000 square feet	Galvanized woven wire gauze 28 swg 14 meshes per lineal inch, 36 inches wide, in rolls of approximately 100 feet.
2110	7,000	Complete sets of 749/742 taper roller bearings, inside diameter 3.3475".
2111	40	Bearings as follows:
	40	Timken E E 516057/516.122.
	40	Timken 99.550/99.100.

44 *Exhibit No. 17*

ASSISTANT COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON

B-35781: DEC. 27, 1943.

MR. THOMAS W. DAVIS,
General Solicitor,
Atlantic Coast Line Railroad Company,
Wilmington, North Carolina.

DEAR MR. DAVIS: Reference is made to your letter of August 24, 1943, and, also, to your letter of October 14, 1943, which was

associated upon receipt, with pertinent records in the Claims Division of this office and has just come to my attention, relative to your claims for $4,273.57 in connection with certain shipments of phosphate rock from points in Florida, to Tampa, Florida, descriptions of said shipments being set out in detail in a tabulation transmitted with your letter of August 24. It appears that the shipments in question were made pursuant to the lend-lease program and that you are of the opinion that the commercial charges for transporting this property cannot be subjected to land-grant deductions.

The records indicate that the shipments here concerned consisted of phosphate rock or super-phosphate (concentrated phosphatic fertilizer) shipped by the Phosphate Mining Company, the Swift and Company Fertilizer Works, the American Agricultural Chemical Company, or the American Cyanamid Company, consigned to the British Ministry of War Transport at Tampa, or Port Tampa, Florida. Claims for the transportation services rendered were presented by the Atlantic Coast Line Railroad Company in bills 20458, 21342, and 21847, stated on the basis of full commercial rates without land-grant deduction, and payments of the amounts so claimed by the carrier were made on vouchers 766142, 1088458 and 1068830, respectively, of the October and December, 1941, accounts of G. F. Allen, chief disbursing officer, Treasury Department. In the audit of these accounts there was noted the failure to deduct for land grant in the aggregate amount of $4,273.57 and, accordingly, upon suspension of credit against the chief disbursing officer, that official effected adjustments in voucher 616457, 879797, and 1565180 of his accounts for September and November, 1942, and February, 1943, respectively, through deductions totaling $4,273.57 from amounts otherwise payable to the Atlantic Coast Line Railroad Company on its bills 29892, 34556, and 36667. Thereafter, the carrier's Auditor of Freight Receipts presented claims to this office in the form of letters dated February 3, 1943, file 3972–A, and July 3, 1943, file 3536–T, for the aggregate amount so deducted in adjustment, contending, in effect, that the carrier did not consider the property comprising the subject shipments to be such as to come within the exception to the requirement for payment of full commercial charges as contemplated by section 321 of the Transportation Act of 1940, 54 Stat. 898, 954, which provides:

"Notwithstanding any other provision of law, but subject to the provisions of section 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier

subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military of naval and not for civil use * * *."

and that, therefore, the commercial transportation charges otherwise applicable are not subject to deduction for land grant. These claims now are pending in this office under numbers 719945, 728233 and 728234.

The matter here concerned is similar to that considered in letter of October 12, 1943, B-29861, addressed to the Auditor of Revenues of the Seaboard Air Line Railway, a copy of which is enclosed for your information, which related to land-grant deductions from commercial transportation charges otherwise payable for transporting certain shipments of phosphate rock in 1941 from mines in Florida to Tampa, Florida, over lines of the Seaboard Air Line Railway, consigned to the British Ministry of War Transport.

As pointed out in that letter the administrative offices concerned have reported that they regard the transportation of "defense articles" purchased under the lend-lease program as transportation of military property; also, as was likewise there stated, it has been noted that two suits involving the question of the right of the United States to deduction for land grant from charges for the transportation of "defense articles" shipped pursuant to the lend-lease program have been filed against the United States recently by the Southern Pacific Company—one in the Court of Claims of the United States and one in the United States District Court for the Eastern District of Kentucky. In view of this situation, this office, in the absence of a judicial determination of the matter, would not be justified in modifying the adjustments here concerned, which were effected on the basis that the shipments consisted of "military or naval property of the United States moving for military or naval and not for civil use." Accordingly, instructions will be given for the disallowance of the three claims above mentioned in order that the records of this office may show that the matter has been disposed of here.

Respectfully,

(Signed) FRANK L. YATES,
Assistant Comptroller General
of the United States.

Enclosure.

46 In United States District Court

Answers to interrogatories addressed to defendant

Filed January 4th, 1945

Defendant, for his answer to Interrogatories proposed by Plaintiff, submits the following:

First. Defendant did not charge and has not charged the Government of Great Britain with the transportation, Freight rates and charges referred to in this Interrogatory, in that it has not demanded, received or contracted for repayment by Great Britain of the same, or any part thereof. These costs were paid out of lend-lease appropriations. The defendant maintains for its own purposes records showing the procurement and transportation costs and other expenses of defense aid on each lend-lease requisition. Those records include the said freight charges among the total cost and expenses borne by defendant against United Kingdom requisitions.

Second and third. In view of the answers to the First Interrogatory, no answer to the Second and Third Interrogatories is necessary.

UNITED STATES OF AMERICA,
(Sgd.) Francis M. Shea,
FRANCIS M. SHEA,
Assistant Attorney General.

[*Duly sworn to by Leonard W. A'Hearn; jurat omitted in printing.*]

I hereby certify that I have delivered copy of Answers to Interrogatories to Collins Denny, Jr., Esquire, of counsel for the plaintiff, in person.

(Sgd.) JOHN V. COGBILL,
Assistant United States Attorney.

JANUARY 4, 1945.

48 In United States District Court

Civil Action No. 306

ATLANTIC COAST LINE RAILROAD COMPANY, PETITIONER

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

Memorandum opinion of the court

Filed April 21st, 1945

In this case the Court is called upon to determine the freight rate applicable under Section 321 (a) of the Transportation Act

of 1940 (Title 49, Section 65 (a), U. S. C. A.) to certain shipments of phosphate rock or pebble phosphate rock which were being transported by the petitioner under Government bills of lading to Great Britain under the Lend-Lease Act. The Transportation Act of 1940 provides that the full applicable commercial rates shall be paid for the transportation by any common carrier of property of the United States except upon "the transportation of military or naval property of the United States moving for military or naval and not for civil use." The petitioner, Atlantic Coast Line Railroad Company, contends that the rate applicable to said shipments is the usual commercial rate and the defendant, United States of America, contends that the petitioner is entitled to charge and receive only the rates commonly known as land grant rates. If the contention of the petitioner is upheld, the cross-claim filed by the defendant should be dismissed and judgment entered for the petitioner on the claim asserted in the complaint. If the contention of the defendant is sustained, judgment for the defendant should be entered on the cross-claim.

The court finds the facts to be those facts stipulated between the parties and included in a stipulation dated November 15, 1944, and duly filed on December 20, 1944, as a stipulation in this action. Said stipulated facts are as follows:

1. The defendant admits all of the allegations in the complaint, except the allegation that it is indebted to the plaintiff in the amount of $4,192.33. Therefore, the facts to be stipulated, other than those contained in the complaint, affect the defendant's counterclaim.

49 2. On August 29, 1941, and September 12, 1941, a number of cars of phosphate rock or pebble phosphate rock moved on five Government bills of lading, DA-TPS 190232, 190233, 190234, 190241, and 190247, respectively, from Agricola, Pierce, and Brewster, Florida, to Tampa, Florida, over the plaintiff's railroad, consigned to the British Ministry of War Transport, all of which more fully appears from copies thereof attached hereto, as a part hereof, marked "Exhibits 1, 2, 3, 4, and 5."

3. Said phosphate rock mentioned in paragraph 2 above was procured by the defendant under four contracts, as follows: Contract DA-TPS 458, dated July 21, 1941; contract DA-TPS 973, dated August 11, 1941; contract DA-TPS 452, dated July 21, 1941; and contract DA-TPS 971, dated August 11, 1941, bids for which last named contract were sent out by telegram. Copy of each of said contracts and bids, including telegraphic bid, is attached hereto, as a part hereof, marked "Exhibits 6, 7, 8, and 9."

4. On September 23, 1941, a number of cars of phosphate rock or pebble phosphate rock moved on Government Bill of Lading DA-TPS 190246 from Pierce, Florida, to Tampa, Florida, over the plaintiff's railroad, consigned to the British Ministry of War Transport, as more fully appears from a copy thereof, attached hereto as a part hereof, marked "Exhibit 10."

5. Said phosphate rock was procured by the United States under Contract DA-TPS 452, dated July 21, 1941 (Exhibit 8).

6. The plaintiff Company duly rendered bills based on commercial rates for these shipments and the defendant paid them. Copies of said bills are attached hereto as a part hereof, marked "Exhibits 11 and 12."

7. Upon audit of said bills by the General Accounting Office, a "Notice of Exception" in each instance was issued suspending credit in the accounts of the disbursing officer for the amounts shown in said Notices, copies of which are attached hereto as a part hereof, marked "Exhibit 13." The aggregate credit thus suspended was $4,192.33, the amount for the recovery of which the plaintiff sues.

8. On October 12, 1943, said Comptroller General of the United States made a ruling B-29861 concerning sundry deductions from Seaboard Air Line Railway charges account land grant rates as applied to shipment of phosphate rock, a copy of which ruling is attached hereto as part hereof, marked "Exhibit 14." Said ruling refers to a communication from the Lend-Lease Administration, which is a letter from Honorable E. R. Stettinius, Jr., Lend-Lease Administrator, to Honorable Roy F. Hendrickson, Deputy 50 Food Administrator, dated September 21, 1943, a copy of which is attached hereto as a part hereof, marked "Exhibit 15." (See, also, a copy of the President's Directive of October 1, 1941, to which reference is made, and which is made a part hereof and attached hereto, marked "Exhibit 16.")

9. On December 27, 1943, the Comptroller General of the United States made a ruling B-35781 concerning certain deductions from bills rendered by the plaintiff, attached to which was his ruling B-29861 concerning sundry deductions made by him from Seaboard Air Line Railway bills. A copy of said ruling is attached hereto, marked "Exhibit 17," and made a part hereof.

10. The British Ministry of War Transport is an agency which is the duly authorized representative in the United States of His Majesty's Government. All commodities covered by the bills of lading mentioned in the pleadings and in this stipulation were exported to Great Britain under the Lend-Lease Act of March 11, 1941, Public No. 11 (55 Stat. 31), and Act of March 27, 1941, Public No. 23 (55 Stat. 53).

11. The Seaboard Air Line Railway is the only land grant railroad company in Florida over whose line land grant rates apply from Agricola, Pierce, and Brewster, Florida, and said Seaboard Air Line Railway has filed with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interest in lands, compensation or reimbursement on account of lands or interest in lands, which had been granted, claimed to have been granted, or which it is claimed to have been granted, to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid, and such release was filed within one year from the date of the enactment of the Transportation Act of 1940. The Department of Interior approved the said release or releases filed by the Seaboard Air Line Railway with the Department of Interior, as shown by Federal Register, Vol. 7, 136, page 5319, which is made a part hereof. The stations named above are on the Seaboard Air Line Railway and are located on the original Florida Central and Peninsular Railroad Company referred to in said certificate issued by the Land Grant Office of the Department of Interior, June 29, 1942, and set forth in said Register mentioned above.

12. The plaintiff is not a land grant railroad. It has, however, entered into equalization agreement with the defendant, dated April 14, 1938 (May 2, 1938), a copy of which is hereto attached, as a part hereof, marked "Exhibit 18." The stations of Agricola, Pierce, and Brewster are stations on both the Atlantic Coast Line Railroad Company and Seaboard Air Line Railway.

13. It is further stipulated and agreed, subject to objection as to relevancy or competency of the evidence, as follows:

The shipments involved in the counterclaim were "defense articles" as defined in the Lend-Lease Act.

When a requisition is made by any country, the defense of which the President deems vital to the defense of the United States, such requisition is carefully considered and scrutinized. It is then accepted, modified, or rejected in accordance with the determination by the President or his duly authorized representative, such as Lend-Lease Administrator or Foreign Economic Administration, as to whether or not shipment of the materials requisitioned will promote the defense of the United States in accordance with the provisions of the Lend-Lease Act.

In 1941 at the times the requisitions for the materials involved in the counterclaim were made, approved, and authorized; and the shipments moved, there was a serious food situation in Great Britain, by virtue of the fact that Great Britain, normally a heavy

food importing nation, was cut off from many sources of supply. Imports were further restricted by shortage of shipping. Great Britain, therefore, found it necessary to revise her agricultural practices in order to intensify the production of food for direct human consumption. It was necessary to put into production a large acreage of land normally not used for the production of food for direct human consumption, and phosphate fertilizers had to be imported and distributed to effectuate this revised agricultural program. The shipments of phosphage rock and superphosphate comprised a part of that program. Great Britain instituted controls which resulted in the proper use and distribution of said materials to accomplish this purpose, for which they were requisitioned, and authorized under the Lend-Lease Act. In 1941, the United States was the only practical source from which Great Britain could acquire such materials.

52 It is further stipulated and agreed that either party may refer to the official published reports made to Congress by or on behalf of the President pursuant to the term of the Lend-Lease Act, and to rulings of the Comptroller General, without objection, and without their formal introduction in evidence. Dated November 15, 1944.

The facts stipulated are not in any material respect different from the facts in a suit instituted in the Norfolk Division of this Court previous to the institution of this action. In that case (Legh R. Powell, Jr., et al, as Receivers of the Properties and Assets of Seaboard Air Line Railway Company, Petitioners, v. The United States of America, Defendant) Judge Sterling Hutcheson has rendered a written opinion on March 24, 1945. It seems to me that the reasoning of Judge Hutcheson in that case is sound and that the conclusion reached by him is correct. Under the stipulated facts and on authority of that case I conclude the law of this case to be that the phosphate rock or pebble phosphate rock which was being transported upon Government bills of lading was not military or naval property of the United States at the time it was being transported and was not then moving for military or naval use but was moving for civil use within the meaning of Section 321 (a) of the Transportation Act of 1940 and that therefore the freight rates applicable to such shipments are the full commercial rates.

An order may be presented after reasonable notice dismissing the counterclaim asserted by the defendant and rendering judgment for the petitioner in the sum demanded in the complaint.

(Sgd.) ROBT. N. POLLARD,
United States District Judge.

APRIL 21, 1945.

53 In United States District Court

Civil Action No. 306

ATLANTIC COAST LINE RAILROAD COMPANY, PETITIONER

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

Order entering judgment in favor of petitioner and dismissing defendant's counterclaim

Entered and filed May 4th, 1945

This day came the parties, by their attorneys, and the Court having fully considered the questions arising upon the pleadings and proofs and arguments of counsel thereon, all facts having been stipulated by the parties in writing, filed in the Cause, and the Court, in its written opinion, filed herein on April 21, 1945, having set forth the specific findings of fact and its conclusions upon all questions of law involved in this case and the Court being of opinion that the petitioner is entitled to recover and that the defendant is not entitled to recover on its counterclaim, doth so decide. Accordingly, the Court doth adjudge, order and decree that the said Atlantic Coast Line Railroad Company do recover of the United States of America the sum of four thousand, one hundred and ninety-two dollars and thirty-three cents ($4,192.33) with interest at the rate of four per cent per annum from the date hereof until paid and its cost, as provided by law. The Court doth further adjudge, order and decree that the counterclaim filed by the defendant is hereby dismissed and that this case be removed from the docket.

(Sgd.) ROBT. N. POLLARD,
United States District Judge.

MAY 4, 1945.

58 In the United States Circuit Court of Appeals for the Fourth Circuit

No. 5428

UNITED STATES OF AMERICA, APPELLANT

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, A CORPORATION, APPELLEE

APPEAL from the District Court of the United States for the Eastern District of Virginia, at Richmond

September 8, 1945, the transcript of record is filed and the cause docketed.

September 10, 1945, the appearance of Harry H. Holt, Jr., U. S. Attorney, is entered for the appellant.

September 12, 1945, the appearance of Thos. W. Davis, J. M. Townsend and Collins Denny, Jr., is entered for the appellee.

October 2, 1945, petition of appellee for permission to file brief in excess of fifty printed pages is filed.

Same day, order granting special permission to appellee to file brief in excess of fifty printed pages but not exceeding ninety printed pages is filed and entered.

October 11, 1945, the appearance of John F. Sonnett, Hubert H. Margolies and Frederick Chait is entered for the appellant.

October 12, 1945, petition of appellant for permission to file brief in excess of fifty printed pages is filed.

59 Same day, order granting special permission to appellant to file brief in excess of fifty printed pages but not exceeding one hundred printed pages is filed and entered.

October 16, 1945, brief and appendix on behalf of the appellant are filed.

October 29, 1945, brief on behalf of the appellee is filed.

Argument of cause

November 7, 1945 (November term, 1945), cause came on to be heard before Soper and Dobie, Circuit Judges, and Barksdale, District Judge, and was argued by counsel and submitted:

60 United States Circuit Court of Appeals,
Fourth Circuit

No. 5428

UNITED STATES OF AMERICA, APPELLANT

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
(CORPORATION, APPELLEE

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond

(Argued November 7, 1945.—Decided December 13, 1945)

Before SOPER and DOBIE, Circuit Judges, and
BARKSDALE, District Judge

Opinion

Filed December 13, 1945

Hubert H. Margolies, Attorney, Department of Justice,
61 (John F. Sonnett, Assistant Attorney General; Harry H.

Holt, U. S. Attorney; John V. Cogbill, Assistant U. S. Attorney, Frederick Chait and Irvin M. Gottlieb, Attorneys, Department of Justice, on brief) for Appellant; and Thomas W. Davis (J. M. Townsend and Denny, Valentine & Davenport on brief) for Appellee.

DOBIE, Circuit Judge:

The facts in this case and the question arising on these facts differ in no essential respects from the facts and the question involved in No. 5406, United States v. Powell and Anderson, Receivers of the Seaboard Air Line Railway Company, decided by us this day. The two causes, though not formally consolidated, were argued before us together.

For the reasons set out in our opinion in the Seaboard case (No. 5406), the judgment of the District Court is affirmed.

63

United States Circuit Court of Appeals.
Fourth Circuit

No. 5428

UNITED STATES OF AMERICA, APPELLANT

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, A CORPORATION, APPELLEE

Appeal from the District Court of the United States for the Eastern District of Virginia

Judgment

Filed and Entered December 13, 1945

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

MORRIS A. SOPER,
U. S. Circuit Judge.
ARMISTEAD M. DOBIE,
U. S. Circuit Judge.
A. D. BARKSDALE,
U. S. District Judge.

On another day, to wit, January 14, 1946, the mandate of this Court, in this cause, is issued and transmitted to the District Court of the United States for the Eastern District of Virginia, at Richmond, in due form.

64 Supreme Court of the United States

[Title omitted.]

Stipulation

Subject to this Court's approval, it is hereby stipulated and agreed, by and between the attorneys for the respective parties hereto, that for the purpose of the petition for a writ of certiorari the printed record may consist of the following:

1. Appendix B to brief for appellant in the United States Circuit Court of Appeals for the Fourth Circuit.

2. The proceedings had before the United States Circuit Court of Appeals for the Fourth Circuit.

It is further stipulated and agreed that petitioner will cause the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit to file with the Clerk of the Supreme Court a complete certified transcript of the record on appeal in the Circuit Court of Appeals for the Fourth Circuit; and that, in the event the petition for writ of certiorari is granted, the printed record shall consist of the proceedings in the Circuit Court of Appeals for the Fourth Circuit and such portions of the complete transcript of record on appeal in that court as the parties may designate.

It is further stipulated and agreed that either of the
65 parties hereto may refer in his brief to the record filed in the Supreme Court of the United States.

Dated this 4th day of March, 1946.

J. Howard McGrath,
J. Howard McGrath,
Solicitor General,
Attorney for Petitioner.
Thos. W. Davis,
J. M. Townsend,
Collins Denny, Jr.
Attorneys for Respondent.

66 In United States Circuit Court of Appeals

Order authorizing clerk to use original transcript of record in making up record for use in the Supreme Court of the United States on application for writ of certiorari

For reasons appearing to the court, it is ordered that the Clerk of this Court, in making up certified transcript of records for use in the Supreme Court of the United States on applications for writs of certiorari to this Court, be, and he is hereby, authorized to use and incorporate therein the original transcripts of records filed in this Court. The said original transcripts of records shall be returned to this Court after the cases are finally disposed of in the said Supreme Court.

Further ordered that a copy of this order be incorporated in said certified transcripts of records.

JOHN J. PARKER,
Senior Circuit Judge.

JANUARY 9th, 1941.

67 [Clerk's certificate to foregoing transcript omitted in printing.]

68 Supreme Court of the United States

[Title omitted.]

Order allowing certiorari

Order allowing certiorari

Filed April 29, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON took no part in the consideration or decision of this application.

69 In the Supreme Court of the United States

Stipulation

Filed Aug. 7, 1946

Subject to this Court's approval, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that for the consideration of this case on the writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit

granted April 29, 1946, the printed record may consist of the following:

1. The material contained in the printed transcript of record (consisting of 11 pages) used for the purposes of the petition for writ of certiorari herein.

2. The following additional portions of the complete transcript of the record on appeal to the Circuit Court of Appeals:

a. Respondent's petition in the District Court of the United States for the Eastern District of Virginia, and exhibit thereto.

b. Order allowing defendant to withdraw certain pleadings formerly filed, etc., dated September 29, 1944.

c. Petitioner's answer and counterclaim, filed September 29, 1944.

70 d. Respondent's reply to amended answer and counterclaim, filed September 1, 1944.

e. Interrogatories addressed to defendant.

f. Answer to Interrogatories addressed to defendant.

g. "Exhibit 1" to the Stipulation of Facts (filed December 20, 1944), consisting of a copy of a bill of lading, DA–TPS-190232, which is stipulated and agreed to be typical of the bills of lading covering the shipments involved in the above-entitled case.

h. "Exhibit 11" to the Stipulation of Facts, consisting of a copy of a bill rendered by respondent, which is stipulated and agreed to be typical of the bills rendered by respondent for transportation charges on the shipments involved in the above-entitled case.

i. "Exhibit 13" to the Stipulation of Facts, consisting of "Notices of Exception" issued by the General Accounting Office.

j. "Exhibit 16" to the Stipulation of Facts, consisting of a copy of the President's Directive of October 1, 1941.

k. "Exhibit 17" to the Stipulation of Facts, consisting of a copy of the Comptroller General's ruling B–35781, dated December 27, 1943.

3. This stipulation.

It is further stipulated and agreed that in the briefs of either party reference may be made to any portion of the transcript of record which is not included in the printed record prepared as aforesaid.

Dated this first day of August 1946.

J. Howard McGrath,
J. Howard McGrath,
Solicitor General,
Attorney for Petitioner.

Thos W. Davis,
Attorney for Respondent.

FILE COPY

Supreme Court, U.S.
FILED
MAR 12 1946
CHARLES ELMORE CROPLEY
CLERK

No. 943

In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES, PETITIONER

v.

ATLANTIC COAST LINE RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Cases:	
Powell v. *United States*, 60 F. Supp. 433, affirmed, 152 F. 2d 228	5
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686080—46

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 943

UNITED STATES, PETITIONER

v.

ATLANTIC COAST LINE RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, entered in the above-entitled case on December 13, 1945.

OPINIONS BELOW

The opinion of the District Court of the United States for the Eastern District of Virginia, Richmond Division (R. 1–7), is unreported. The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 9) is reported in 152 F. 2d 230.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 13, 1945. The jurisdic-

tion of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether phosphate rock moved on government bills of lading and consigned to the British Ministry of War Transport under the Lend-Lease Act, 55 Stat. 31, 22 U. S. C. § 411–419, for use as farm fertilizer in Great Britain, is "military or naval property of the United States moving for military or naval and not for civil use", within the meaning of Section 321 (a) of the Transportation Act of 1940, 54 Stat. 898, 954, 49 U. S. C. § 65 (a), and is, therefore, entitled to move at land-grant rather than commercial freight rates.

STATUTES INVOLVED

The relevant portions of the Transportation Act of 1940, 54 Stat. 898, 49 U. S. C. 1, *et seq.*, and of the Lend-Lease Act, 55 Stat. 31, 22 U. S. C. 411–419, are set forth in the Appendix to the petition for certiorari in *United States* v. *Powell and Anderson*, No. 942, this Term, filed concurrently herewith.

STATEMENT

The basic facts were stipulated by the parties (R. 1–7). In August and September 1941, a number of cars of phosphate rock moved on Government bills of lading over the respondent's railroad from Agricola, Pierce, and Brewster, Florida, to

Tampa, Florida (R. 3), consigned to the British Ministry of War Transport (R. 3), a duly authorized representative in the United States of His Majesty's Government (R. 4). They were shipped under the Lend-Lease Act, for export to Great Britain and for use there as farm fertilizer (R. 5–6). Respondent billed petitioner for and petitioner paid the transportation charges on said shipments at the "commercial rates" (R. 3). Thereafter, the General Accounting Office issued Notices of Exception to these payments, "suspending credit in the accounts of the disbursing officer" in the amount of $4,192.33 (R. 3–4). See Section 322 of the Transportation Act of 1940, 54 Stat. 898, 955, 49 U. S. C. 66. Thereafter, the Comptroller General made appropriate deductions from other bills admittedly due respondent. Respondent instituted this action in the United States District Court for the Eastern Disrict of Virginia to recover the amounts so withheld. Petitioner filed its counterclaim for the same amount.

The parties also stipulated that the shipments involved were of "defense Articles", as defined in Section 2 of the Lend-Lease Act; that when requisition is made by any country, the defense of which the President of the United States deems vital to the defense of the United States, such requisition is considered and scrutinized; that it is accepted, modified, or rejected in accordance with the determination by the President or his repre-

sentative, such as the Lend-Lease Administrator or the Foreign Economic Administration, as to whether or not shipment of the requisitioned materials will promote the defense of the United States in accordance with the provisions of the Lend-Lease Act; that "In 1941 at the times the requisitions for the materials involved in the counterclaim were made, approved, and authorized, and the shipments moved, there was a serious food situation in Great Britain, by virtue of the fact that Great Britain, normally a heavy food importing nation, was cut off from many sources of supply"; that it was necessary for Great Britain to intensify production of food for direct human consumption and for this purpose to use phosphate fertilizers; that "the shipments of phosphate rock and superphosphate comprised a part of that program"; and that "Great Britain instituted controls which resulted in the proper use and distribution of said materials to accomplish this purpose, for which they were requisitioned and authorized under the Lend-Lease Act" (R. 5–6).

The parties further stipulated that the Seaboard Air Line Railway is the only land-grant railroad company in Florida over whose line land-grant rates apply from Agricola, Pierce, and Brewster, Florida, which stations are stations on both the respondent's railroad and the Seaboard Railway; that the Seaboard Railway has filed with the Sec-

retary of the Interior a release of any claims it may have against the United States to lands granted to it; that such release was filed within one year from the date of the enactment of the Transportation Act of 1940 and was approved by the Department of the Interior; and that respondent is not a land-grant railroad but has entered into an "equalization agreement" with petitioner (R. 5).

The district court found (R. 7) that "the facts stipulated are not in any material respect different from the facts in" *Powell* v. *United States*, 60 F. Supp. 433, affirmed, 152 F. 2d 228 (C. C. A. 4), petition for writ of certiorari pending, No. 942, this Term. "Under the stipulated facts and on authority of that case" the district court concluded that the phosphate rock in question

> * * * was not military or naval property of the United States at the time it was being transported and was not then moving for military or naval use but was moving for civil use within the meaning of Section 321 (a) of the Transportation Act of 1940 and that therefore the freight rates applicable to such shipments are the full commercial rates. (R. 7.)

The court accordingly entered judgment for respondent for $4,192.33 and dismissed petitioner's counterclaim (R. 1).

On appeal, the circuit court of appeals held that "the facts in this case and the question arising

on these facts differ in no essential respects from the facts and the question involved in *United States* v. *Powell and Anderson,* Receivers of the Seaboard Air Line Railway Company, 152 F. 2d 228" (C. C. A. 4), petition for a writ of certiorari pending, No. 942, this Term, and affirmed the judgment of the district court "for the reasons set out in our opinion" in that case (R. 9).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Fourth Circuit erred:

1. In holding that the United States was not entitled to land-grant rates on the shipment of phosphates under the Lend-Lease Act for use in Great Britain.

2. In holding that such phosphates, belonging to the United States and exported to Great Britain pursuant to the Lend-Lease Act for use as farm fertilizer in Great Britain, were not "military or naval property of the United States," within the meaning of Section 321 (a) of the Transportation Act of 1940.

3. In holding that such phosphates, belonging to the United States and shipped on consignment to the British Ministry of War Transport, pursuant to the Lend-Lease Act, for export to Great Britain for use there as farm fertilizer, were not "moving for military or naval and not for civil use," within the meaning of Section 321 (a) of the Transportation Act of 1940.

4. In holding that not all "defense articles," within the meaning of the Lend-Lease Act, exported pursuant to the Lend-Lease Act, are "military or naval property of the United States," within the meaning of Section 321 (a) of the Transportation Act of 1940.

5. In holding that not all "defense articles," within the meaning of the Lend-Lease Act, exported under that Act, are "moving for military or naval and not for civil use," within the meaning of Section 321 (a) of the Transportation Act of 1940.

6. In affirming the judgment of the district court which had entered judgment for respondent and dismissed petitioner's counterclaim.

REASONS FOR GRANTING THE WRIT

In this case, as in *United States* v. *Powell and Anderson*, No. 942, this Term, now pending on a petition for a writ of certiorari, we submit that the court below was in error in holding that the Government was obligated to pay the full commercial freight rates rather than the lower land-grant rates on shipments of phosphates consigned to the British Ministry of War Transport for export to Great Britain under the Lend-Lease Act and for use there as farm fertilizer. The reasons for granting the writ in this case are identical with those set forth in the petition for certiorari in the *Powell and Anderson* case.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

MARCH 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946

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Office - Supreme Court, U. S.
FILED
OCT 29 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 57.

UNITED STATES OF AMERICA,
Petitioner,

v.

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

BRIEF OF RESPONDENT.

THOMAS W. DAVIS,
Wilmington, N. C.,

J. M. TOWNSEND,
Petersburg, Virginia,

DENNY, VALENTINE & DAVENPORT,
Richmond, Virginia,
Attorneys for Respondent.

Wilmington, N. C.,
October 17, 1946.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 57.

UNITED STATES OF AMERICA,
Petitioner,

v.

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

BRIEF OF RESPONDENT.

I.

STATEMENT OF CASE AND FACTS.

This action was brought by the Railroad Company against the Government to recover the sum of $4,192.33, being the unpaid balance of the sum of $12,630.40 due by the Government to the appellee for shipments of phosphate rock from Pembroke, Florida, consigned to the British Ministry of War Transport, Norfolk, Virginia, July 24, 1942, and various shipments of steel from Greenville Piers, New Jersey, by J. D. Barry, Jr., as to one car and S. S. Bennett as to all other cars, consigned to the same consignee at Charleston, South Carolina, June 1, 1942. The Railroad Company rendered the bills against the Government for $12,630.40 and the Government deducted from the

bills $4,192.33. The appellee accepted the sum of $8,438.07 under protest and brought suit. The Government filed a counterclaim, alleging, as shown in the stipulation of facts, that the Railroad Company hauled large quantities of phosphate rock from phosphate mines in Florida consigned to the British Ministry War Transport, Tampa, Florida, upon charges computed at commercial rates which the Government paid. The Government alleged in its counterclaim that the phosphate rock was military and naval property of the United States moving for military and naval and not for civil use, and that it was entitled to land-grant deduction. In the Stipulation of Facts it was shown that at the time of the movement of these products there was a serious food shortage in Great Britain, who found it necessary to revise its agricultural practices to increase the production of food; that it was necessary to put into production a large area of land normally not used for the production of food, and phosphate fertilizers had to be imported and distributed to effectuate this revised agricultural program, and shipments of phosphate rock and superphosphates, including the shipments involved in this case, comprised a part of that program; that the United States, in 1941, was the only source from which Great Britain could acquire such materials. It appears from answers to interrogatories propounded by the Railroad Company that the freight rates were included in the cost of fertilizer shipments to Great Britain.

PROCEEDINGS BELOW.

The District Court found that there was no dispute about the facts and that phosphate rock or pebble phosphate rock, which was being transported upon Government bills of lading, was not military or naval property of the United States at the time it was being transported and was not moving for military and naval use, but was moving for civil use within the meaning of Section 321(a) of the Transportation Act of 1940, and that the freight rates applicable to such shipments were the full "commercial rates".

In his opinion the District Judge referred to an opinion by Judge Hutcheson of the District Court of Virginia dated March 24, 1945, 60 Fed. Supp. 433, which in effect he adopted. He reached the same conclusion as did Judge Hutcheson. The opinion of the Circuit Court of Appeals in this case is found in 152 Fed. (2d) 230, and the opinion in *United States* v. *Powell* in 152 Fed. (2d) 228.

II.

ISSUE INVOLVED.

The issue involved is whether under the facts the phosphate rock was "military or naval property of the United States, moving for military or naval and not civil use" as that term is employed in Section 321(a) of the Transportation Act of 1940. If it was, land-grant rates will apply as claimed by the Government. If it was not, the Government was properly billed at the applicable commercial rates.

III.

STATUTES INVOLVED.

The statutes involved are Sections 321(a), 321(b) and 322 of the Transportation Act of 1940, United States Code, Title 49, Section 65(a), and the act commonly known as the Lend-Lease Act, entitled "An Act Further to Promote the Defense of the United States", Public Law No. 2, 77th Congress, 1st Session, H. R. 1776, United States Code, Title 22, Sections 411, 423, effective March 11, 1941, printed in the appendix hereto.

IV.

HISTORY OF THE LAND-GRANT STATUTES.

To assist in the opening of the West in the latter half of the 19th century, Congress patented to various railroad companies portions of the public domain upon condition that the railroads construct lines of railroad and grant to

the Government reduced rates under varying degrees. Some of the Acts provided that the railroads should transport property and troops of the United States without charge and others at 50 per cent of the commercial rate. The provisions of law covering these land-grant deductions are now contained in Title 10, Paragraph 1375 of the United States Code, which provides that in charging for transportation by land-grant roads the Government shall pay at such rates as the Secretary of War shall deem just and reasonable, not to exceed 50 per centum of the full amount of compensation, . . . for the transportation of property or troops of the United States over any railroad which under land-grant acts, was aided in its construction by a grant of land on condition that said railroad shall be and remain a public highway for the use of the United States.

These provisions of law resulted in (1) discrimination against non-land-grant railroads, and (2) discrimination against shippers of the very sort the Interstate Commerce Act was intended to prevent, thus giving shippers located on land-grant routes who sell to the Government a distinct advantage over shippers on non-land-grant routes.

The wording of the statute itself gave rise to a great many suits involving the interpretation of the words "property or troops of the United States". One of the leading cases on this subject is *United States* v. *Galveston, Harrisburg & San Antonio R. R. Co.*, 279 U. S. 401. Army officers were required to furnish, at their own expense, their mounts, and the question arising under this case was whether the transportation of such mounts could be made at land-grant rates. The Court held that:

> "The United States demands service from its army officers which requires the use of things furnished by them. But it does not own and, as between it and them, it does not claim to own, hold or have any property rights in the uniforms, manuals, clothes, private mounts or other things by them furnished and used in the service. It would be unreasonable to hold valid the Government's claim of ownership asserted merely to

secure land grant rates for the transportation of such amounts. The construction contended for is without support and cannot be sustained."

Before reaching this conclusion, the Court stated (p. 404):

"The right of the United States to have the concessions and allowances in respect of transportation made by the carriers in consideration of the aid given is a continuing one. It is of great value to the Government and of course correspondingly burdensome to the carriers. *The terms of the obligation are to be sensibly and fairly read according to the words employed and not expanded or restricted by construction.* When considering another question arising under a like provision in a land grant Act, this Court said: 'It might be very convenient for the government to have more rights than it has stipulated for; but we are on a question of construction, and on this question the *usus loquendi* is a far more valuable aid than the inquiry what might be desirable'. *Lake Superior & Mississippi R. R. Co. v. United States*, 93 U. S. 442, 454."

Another fairly recent case is *Southern Pacific Co.* v. *United States*, 285 U. S. 240, which involved the question whether army officers of the Engineer Corps traveling in connection with the improvement of rivers and harbors or the work of the California Debris Commission were "troops of the United States" within the meaning of the land-grant Act. The court there held that the activities of the officers "in connection with rivers and harbors or the work of the California Debris Commission is non-military in character, and falls within the same category as that of many other employees and officials of the War Department, the nature of whose services excludes them from classification as part of the 'troops of the United States'."

The Court of Claims has rendered numerous decisions involving the question whether persons transported come within the term, some of which are *C. R. I. & P.* v. *United*

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* Note: Italics in this brief are supplied.

States, 58 Ct. Cl. 33; *Oregon-Washington Railroad & Nav. Co.* v. *United States*, 60 Ct. Cl. 458; *Illinois Central R.* v. *United States*, 62 Ct. Cl. 61; *Louisville & Nash. R. Co.* v. *United States*, 62 Ct. Cl. 154; *Minneapolis, St. P. & S. M. Ry.* v. *United States*, 64 Ct. Cl. 557, and *Southern Pacific Co.* v. *United States*, 89 Ct. Cl. 434.

In order to secure traffic which otherwise would move over land-grant routes at reduced rates, the non-land-grant carriers, including appellee, many years ago entered into so-called equalization agreements with the War Department under which they agreed to accept for transportation property and troops of the United States at land-grant rates if such transportation could be made in whole or in part over land-grant routes. Over the years, it is estimated that the land-grant railroads have paid to the Government by these reduced rates many time the value of the lands transferred to them and in addition the Government has realized large returns on increased values of public domains contiguous to the railroads constructed.

On March 17, 1938, the President appointed a Committee of Three, consisting of Interstate Commerce Commissioners Splawn, Eastman, and Mahaffie, to report upon the question of transportation, and especially the condition of the railroads, which was very acute. This Committee made its report to the President on March 24, 1938, (H. Doc. No. 583, 75th Congress, 3rd Session).

On September 30, 1938, he appointed a Committee of Six, composed of three representatives of railway management and three representatives of railway labor, for the same purpose. This Committee reported on December 23, 1938. It was commonly called the Committee of Six.

The Interstate Commerce Commission, on February 25, 1939, was asked by the Chairman of the House Committee on Interstate and Foreign Commerce to submit a report covering, among other things, its recommendation for transportation legislation made in the reports of these two Committees and on H. R. 2531, which contained a provision repealing land-grant deductions. In response to this re-

quest, on March 20, 1939, Hon. Jos. B. Eastman, Chairman of the Legislative Committee of the Interstate Commerce Commission, wrote a letter to the Chairman of the Committee on Interstate and Foreign Commerce of the House of Representatives upon House Bills 2531 and 4307, relating to Omnibus Transportation legislation, in which it was recommended that land-grant rates be abolished. (See House Committee Print, 76th Congress, 1st session.) On page 32 of the report, he says:

> "(7) We favor the proposals of the Committee of Three, the Committee of Six, and H. R. 2531 that the requirements in existing statutes for so-called 'land-grant deductions' in connection with the carriage by railroads of Government traffic be removed."

Prior to the introduction of H. R. 2531, S. 3876, 75th Congress, 3rd Session, and H. R. 10620, 75th Congress, had been introduced early in 1938. S. 3876 contained the following provisions:

> "* * * United States Government shall pay the applicable commercial rate for the transportation by railroad of any persons or property for the United States or on its behalf, except such applicable commercial rates shall not be paid for the transportation of men, officers, or personnel in any branch of the military or naval service and military or naval property."

H. R. 10620 provided for complete repeal of the land-grant rates without any exception being made for military and naval or other classes of property. Hearings on this latter bill were held by the Committee on Interstate and Foreign Commerce from May 31, 1938, to June 2, 1938. At these hearings Interstate Commerce Commissioner Joseph B. Eastman testified (pp. 6 and 7 of the Report of Hearings):

> "As I have indicated, also, these rate deductions are now a burden on many non-land-grant railroads. Furthermore, in recent years, the transportation of Government property has increased far beyond what

was originally contemplated. At the time of the original land grants there was some transportation of Government troops and of property in connection with these troops, but comparatively little else. At the present time there is a tremendous amount of Government transportation of property in connection with many of the emergency units as well as increased transportation by the Army and Navy."

At these hearings Lieutenant Colonel Carl Halla, Finance Department General Staff, United States Army, made a statement which he began by reading an official written report prepared by the War Department for presentation to the Committee. A portion of this written report follows (pp. 16-17 of Report of Hearings):

"When the land grant agreements were entered into, the majority of Government property shipped throughout the United States consisted of property, rations, uniforms, and equipment of the armed services. Today this situation has materially changed and agencies of our Government have entered into activities which require them to ship as Government property all classes of supplies, and materials, including hogs, cattle, wheat, butter, eggs, forest service supplies, construction materials used to further general employment. The increase in Government shipment in recent years have made the land grant deduction benefits assume enormous proportions.

"While it is agreed that the nation must support whatever transportation system is required and is desired to be continued, it is the view of the War Department that no injustice would arise if the railroads are required to continue under present agreements to transport troops and supplies for military and naval services at reduced rates. However, there appears to be no good reason why the railroads should be required to transport at reduced rates classes of property not foreseen or anticipated when the original agreement was entered into.

"For the reasons stated above the War Department can see no objection to the provisions of the proposed legislation if the Bill is amended to include the following additional provision:

"On line 7 after the word 'government' insert '*except such provisions as require reductions in the compensation received for the transportation of men, officers, or personnel in any branch of the military or naval service and military or naval property*'."

The 75th Congress ended without either S. 3876 or H. R. 10620 being enacted into law.

Early in the first session of the 76th Congress S. 2009 was introduced. At that time this Bill made no mention of land-grant rates or their repeal. Also, early in the first session of the 76th Congress H. R. 2531 was introduced, and it contained the following:

> "Sec. 501(a): Notwithstanding any other provision of law, on or after July 1, 1939, the United States Government shall pay the applicable commercial rate for the transportation by railroad of any person or property for the United States or on its behalf * * * ".

The ground covered in the hearings on H. R. 10620 was not covered in the hearings on H. R. 2531 but the Committee was referred to the prior hearings had in connection with H. R. 10620, 75th Congress. In the committee hearings on H. R. 2531 Mr. Carl R. Gray, President of the Union Pacific Railroad Company testified (p. 160):

> "It has been stated that there are some legal features that would have to be protected; that there is some litigation that the Government may have or has with individual lines. We hoped it would be possible to protect the Government's interest properly in the litigation, but when the land grants were made, the Government movement of troops and of military supplies and the mail was the only thing that was considered."

On May 25, 1939, S. 2009 was passed and sent to the House without any provision in respect of land-grant rates. On May 31, 1939, the Senate Bill was referred to the House Committee on Interstate and Foreign Commerce. The House Committee struck out the Senate Bill and substi-

tuted therefor its own bill, including Section 321(a), as follows:

> "Sec. 321(a): Notwithstanding any other provisions of law, but subject to the provisions of Section 22 of The Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, and full compensation determined by the Interstate Commerce Commission as reasonable therefor shall be paid for the transportation by railroad of the United States mail."

In reporting out this proposed change in the law, the House Committee said (House Report No. 1217, 76th Cong., 1st Session, July 18, 1939, p. 27):

> ". . . Subsection (a) of section 321 provides that notwithstanding any other provision of law, the Government shall pay the full applicable commercial rates, fares, or charges for transportation by any common carriers subject to the Interstate Commerce Act of persons or property for the United States or on its behalf; . . ."
>
> "The effect of subsection (a) is to relieve the carriers from the necessity of transporting persons or property of the United States at land-grant rates."

The Committee held no hearings on this bill but referred it to the House in this form. The House considered and debated the bill sitting as a Committee of the Whole. With reference to land-grant rates Representative Hinshaw said (84:9 Cong. Rec. 10114):

> "Since all of this has taken place, the Government has gone into the freight moving business more and more. The transport of troops and the transport of materials is a very small matter now, and has been a small matter over many years. Now, the Government of the United States is transporting in the hundreds and thousands of tons every conceivable type of commercial freight you can imagine—steel, cement, food

products, and everything else, for the building of roads, dams, post offices, schools and so forth—so the Government has put upon these roads a tremendous burden which was not contemplated when the lands were originally granted."

Representative Martin of Colorado said (84:9, Cong. Rec. 10117):

> "There ought to be an end sometime to the obligation, that it should not continue permanently, be clothed with immortality, and increasing with the growth of Government business from year to year. The entire picture has changed * * *. There is absolutely no comparison between conditions then and now, yet the obligations of the railroads will increase permanently."

On July 26, 1939, S. 2009, as amended by the House Committee, was passed by the House and on July 27, 1939, the bill was sent back to the Senate approved by the House as amended, extended and modified, and Senate concurrence was requested. Section 321 as contained in that Bill, is exactly as heretofore quoted.

The Senate disagreed with the House amendments and requested a joint conference. The Bill that came out of the Joint Conference contained the provision relating to military and naval property, and Section 321(a) was in the form in which it finally passed, namely:

> "Section 321(a): Notwithstanding any other provision of law, but subject to the provisions of sections 1(7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of

the property of such members) when such members are traveling on official duty; * * * ".

The only explanation of the intent of the Committee of the meaning of the Section is found in Conference Report No. 2016, House of Representatives, 76th Congress, Third Session, in which the Managers on the part of the House made the following comments on page 87:

"Land Grant Rates

"Section 321 of part II of title III of the House amendment provided that the full applicable commercial rates, fares, or charges should be paid to any common carrier subject to the Interstate Commerce Act for transportation of persons or property for the United States, or on its behalf, but this provision was conditioned on the release by the carrier of claims against the United States to lands, interests in lands, compensation or reimbursement on account of lands, or interests in lands which has been granted, claimed to have been granted, or which it was claimed should have been granted to such carrier, under any grant from the United States.

"The conference substitute changes this provision by making an exception from this requirement of the payment of full commercial rates by the United States, in the case of the transportation of military or naval property moving for military or naval use, and in the case of the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are travelling on official duty. In the case of transportation thus excepted, existing legal requirements and arrangements providing for reduced rates will continue to apply."

The Transportation Act of 1940 also added a paragraph to the Interstate Commerce Act expressing the *national transportation policy*. This paragraph is as follows:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered

as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of *reasonable charges* for transportation services, *without unjust discriminations, undue preferences or advantages,* or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United Statees, of the Postal service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

V.

HISTORY OF THE LEND-LEASE ACT.

It must be kept in mind that the Transportation Act of 1940 became effective September 18, 1940, and the Lend-Lease Act, H. R. 1776, the title of which is "An Act further to Promote the Defense of the United States, and for Other Purposes", became effective March 11, 1941, six months thereafter. At the time of the effective date of the Lend-Lease Act the Neutrality Act was still in effect. Prior to the time of the enactment of the Lend-Lease Act Congress had passed, on November 4, 1939, an Act which would permit England and France to buy arms here for cash, and carry them away on their own ships. This was known as the "Cash-and-Carry Plan".

Shortly after the fall of Dunkerque the War Department entered into a contract with the United States Steel Export Corporation for various munitions, and the same day the British and the French Governments entered into a contract with us to take title to all this material "F. O. B. cars, as is, and where is", at exactly the same price that the

United States Steel Export Corporation had agreed to pay the War Department, and these goods moved abroad.

Later, the contracts which foreign countries made for purchases in this country were transferred to the British Government. See Stettinius, "Lend-Lease", pages 24-28, 30, 31 and 32.

In the report of the Senate Committee on Foreign Relations, accompanying H. R. 1776, headed "Promoting the Defense of the United States", the Committee under its "General Statement", says:

> "It is the conviction of your committee, confirmed by the testimony of those witnesses, that the *welfare of the United States* can best be served by a foreign policy based, as it has always been, upon two fundamental principles. Those principles are:
>
> 1. The United States must strive in all ways reasonably possible to *stay at peace with the world;* and
>
> 2. The United States must, in its own interests, supply effective material aid to those countries whose defense is vital to our defense.
>
> "Your committee believes that within the terms of H. R. 1776, as amended, provision is amply, safely, and constitutionally made that the foreign policy of the United States shall continue to be guided by these two principles. To the end that we may have peace the bill authorizes aid to be given promptly to those nations whose defense is vital to ours. To the end that we may have freedom, the bill casts the strength of *American industry* into the struggle against forces which may be directed against us. Your committee wishes strongly to emphasize its considered conviction *that H. R. 1776 is not a war measure but a practical safeguard aimed at keeping us out of war.*"

Under "Analysis of the Bill", the Report says:

> "The term 'defense article' is defined so as to include the usual implements of war, such as guns, airplanes, and the like, without which warring nations would be helpless. *The bill contains no authority, however, for sending American troops, under any circumstances, to fight on foreign soil or waters.*

"It should be noted that the term 'defense article' includes all such articles as the United States may hereafter acquire, in addition to those already possessed. This fact derives from the wording which provides that 'defense article' includes articles 'procured pursuant to section 3, or to which the United States or any foreign government has or hereafter acquires title, possession, or control'.

"No part of H. R. 1776, and, in particular, no meaning which may be attached to the word 'facility', as contained in section 2(a)(2), or the word 'procured' in the sentence following section 2(a)(4), authorizes the United States to commandeer or requisition any property in any manner not now provided by law.

"Two limitations upon the powers of the President contained in H. R. 1776 are the prohibitions provided in section 3(a)(2), against (a) any disposition of any defense article not manufactured or procured especially for the defense of a country whose defense is vital to ours 'except after consultation with the Chief of Staff of the Army, or the Chief of Naval Operations of the Navy, or both', and (b) any disposition of defense articles procured from funds heretofore appropriated of a value to exceed $1,300,000,000. These limitations are intended to insure that defense articles shall not be disposed of so as to endanger our Nation by unreasonably weakening our armed forces.

"The definition of the term 'defense article' as contained in section 2(a) of the bill is sufficiently broad to empower the President, when he deems it in the interest of our national defense, to authorize the Secretary of War or the Secretary of the Navy, or any governmental agency head, to test, prove, repair, or otherwise place in good working order any defense article, such as an airplane, ship, or gun belonging to any nation to whom aid may be given under the bill, and to use, for such purposes, a defense facility, such as a drydock, of the United States. Nothing contained in section 2(a), however, enlarges the existing power of the Government to requisition defense articles, such as foreign vessels in our ports. Nor is the repairing of a large flying boat, for a foreign nation, in one of our coastal factories any more of a war-like act than

the building of such a flying boat in the self-same factory."

* * * * * * * * * * *

"Most important of the nine sections contained in the bill is, of course, section 3. Under section 3(a), the President may authorize the Secretary of War or the Secretary of the Navy, or the head of any Government department or agency to manufacture or procure any defense article for any country whose defense the President deems vital to ours; *to dispose* of such articles to such governments (with limitations previously referred to); to repair the defense articles of nations whom we aid under the bill; and to communicate defense information to or for the benefit of those nations."

* * * * * * * * * * *

"The powers authorized under section 3(a) may be exercised 'notwithstanding the provisions of any other law'. The reason for the inclusion of that phrase in the bill is to insure that statutes inconsistent with or partially dealing with the subject matter covered by the provisions of section 3(a) of the bill be not construed so as to prohibit the effective carrying out of the terms of that section. The operation of such statutes, in the field covered by section 3(a) is only temporarily suspended; such laws are not, however, repealed, or in any way affected; in so far as they do not conflict with or overlap section 3(a)."

* * * * * * * * * * *

"Section 3(a)(1) of the bill, in providing for the manufacture or procurement by the United States Government of the defense articles for those nations whose defense is deemed vital to ours, contains no violation of international law."

* * * * * * * * * * *

"Section 3(b) provides that the terms and conditions upon which aid may be furnished to other nations 'shall be those which the President deems satisfactory, and the benefit to the United States *may be payment or repayment in kind or property, or any other direct or indirect benefit which the President deems satisfactory*'.

"Secretary of the Treasury Morgenthau has testified that Great Britain has *only sufficient assets convertible into dollars both here and abroad to pay for orders already placed. The bill accordingly permits payments to be made by other means.* Britain might thus be required to repay the United States for the aid we should give under the bill in raw materials, such as tin and rubber. Or the President could require any of a thousand other direct or indirect benefits to the United States for the transfer of defense articles to a nation whose defense is vital to ours."

VI.

The reports of the President, the Lend-Lease Administrator, and Foreign Economic Administration to Congress, clearly demonstrate that the funds appropriated by Congress for expenditure under Lend-Lease were to be expended for the purchase and transfer of property for the use and benefit of foreign governments, for military, naval and civil use and such was laid down as the policy of the United States in these reports to Congress and such policy was approved by Congress in making other appropriations thereafter, and such shipments are not entitled to land-grant rates.

To show that it was the plain intent of Congress that the Lend-Lease Act *comprise, and the appropriations made therefor be used for,* anything which would benefit these foreign nations, it is only necessary to read in the Congressional Record, Volume 87, page 2097, the remarks of Senator Barkley and Senator Clark, of Missouri, and explanation of Representative Bloom, in reporting the Senate amendment to the House. Senator Barkley said:

"'In order that there may be no doubt that the word 'commodity' includes agricultural commodities, I send forward an amendment to ask that it be agreed to.'"

Senator Clark challenged any Senator to rise on the floor and tell him anything which was not included in the defini-

tion of "defense article", as set forth in Section 2 of the Bill, and no Senator arose.

In fact, the Act is all inclusive and covers everything from birth to death.

From these few expressions, it is plain that Congress intended the Lend-Lease Bill to comprise, and the appropriations made therefor, to be used for anything which the President thought would be to the benefit of these foreign nations.

These reports of the President, the Lend-Lease Administrator and the Foreign Economic Administration show that articles allocated, obligations contracted, and expenditures made, under the Lend-Lease Act and supplements thereto, include a vast variety of goods such as, agricultural and industrial commodities and other articles, food stuffs, dairy products, seed, grain and cereal products, and food stuffs not classified, cotton, tobacco, machinery equipment, materials and supplies, minerals, chemicals, nitrates and phosphates, civilian medical supplies, investment in facilities not owned by the agency, investments in facilities owned by the Defense Plant Corporation, engineering equipment, medical equipment and agricultural implements.

Reports were made quarterly to Congress by the President, the Lend-Lease Administrator, and Foreign Economic Administration, of shipments under Lend-Lease and reverse lend-lease.

The first report of the President to Congress is dated June 10, 1941, Senate Document No. 66, 77th Congress, 1st Session, in which he shows that the purpose of the purchase of defense articles under the Lend-Lease Act was for the sale, transfer or disposition to other Governments.

The reports show that much of the goods shipped under Lend-Lease were for civilian use.

In his first report (Page V), the President said:

> "Millions of pounds of food are being and will be sent. Iron and steel, machine tools, and the other essentials to maintain and increase the production of

war materials in Britain are being sent and received in larger quantities day by day."

In his second report, September 11, 1941, the President outlines the British food program, and shows that hundreds of thousands of tons of food were shipped.

Special attention is called to the President's third report, which is dated December 12, 1941, and gives a report on Lend-Lease operations to November 30, 1941. On page 8 is shown the appropriations and the use to which they were put. On page 10 is shown the allocations and obligations under the Lend-Lease Act of millions of dollars, first by procurement agencies and second by appropriation categories. On page 11 is shown:

"QUANTITIES OF NONMILITARY GOODS TRANSFERRED

To November 30, 1941

Commodity	*Quantity*
Meat and Fish Products	535,742,451 pounds
Milk Products	343,301,116 pounds
Egg Products	87,438,813 pounds
Fruits and Vegetables	548,091,424 pounds
Grain and Cereal Products	719,834,984 pounds
Sugar and Related Products	6,058,740 pounds
Raw Cotton	439,619 pounds
Leaf Tobacco	120,833 hogsheads
Fertilizer	477,162 tons

On page 11, under the heading, "Total Lend-Lease Aid", the President said:

"Lend-Lease aid cannot be adequately reflected by figures alone. * * * It includes the goods which have been completed and the facilities that are being expanded to produce more goods. It includes the raw materials and machine tools that have made it possible for the Lend-Lease countries to step up their production of war material. It includes the hundreds of things that are being done which are described in subsequent chapters."

At Chapter 5 on page 24 of this report, under the title, "The Food Front", the President used these words:

> "*Within recent weeks, Lend-Lease foods marked 'Produce of the U. S. A.' are beginning to appear in sizable quantities on grocers' shelves and in the kitchen of Great Britain.* Since the last report to Congress, *Lend-Lease food* has moved steadily and in increasing quantities over the bridge of ships, bringing new strength to the bodies and new hope to the minds and spirits of the *British people.*"

He further says in the same chapter:

> "Since the beginning of Lend-Lease, we have shipped to the British *food* and *farm* produce totalling 2,796,000,000 pounds with a value of $292,000,000. Of this total, 1,892,000,000 pounds with a value of $181,000,000 have been supplied in the last three months. The steady increase of our aid is shown by the fact that the tonnage provided in the last three months is twice as great as that provided in the preceding six months."
>
> "The British are expanding their production of *bulky goods*, such as *wheat and potatoes*; and have greatly increased *their truck gardening*. Since 1939 acres under cultivation have increased from 12,000,000 to 16,000,000 and some further expansion is expected. To aid this source of production, tractors and other *farm equipment* have been supplied by Lend-Lease and deliveries of *seed* are planned."

He refers in this report to *vitamin* shipments which are largely responsible for a *new project of free distribution of vitamins to children under 2 years of age.*

In the fourth report the President speaks of Lend-Lease machinery and other equipment *fortifying the heavy industries and agriculture* of our allies.

In the President's seventh report, on pages 24 and 25, he speaks of the *policy of the United States to provide food, medicines and other necessities to alleviate the hunger and suffering* of the people in any territory occupied by our forces, as far as it is humanly within our power to do so.

In this report he speaks of steps already taken with respect to North Africa in execution of this policy and that $5,000,000 worth of *civilian* goods were purchased for shipment to that area. He says:

> "The United Nations will help the victims of war in liberated territories, not only out of common humanity, but for the most urgent political and military reasons. Expansion of the *agricultural* production of the reoccupied regions and the improvement of their transportation facilities will be of great value to our military forces. Increased food production on the spot will enable us, after meeting the requirements of the *civilian* population, to supply our forces with some foodstuffs, thus saving valuable shipping space."

In the tenth report, showing the policy of the President and Congress, it is said:

> "In the invasion to come, Lend-Lease supplies will have a two-fold task: to furnish aid to the invading forces of the United Nations, *and to aid the peoples of the liberated areas.* Lend-Lease will continue to furnish greater and greater amounts of war supplies to the United Nations armies. *Lend-Lease supplies will also be needed to assist the people of newly liberated areas to help themselves and the United Nations through restoring the production of their farms, factories and mines.*"

The eleventh report, dated August 25, 1943, says:

> "Lend-Lease agricultural machinery and seeds have *been shipped to facilitate planting, cultivating and harvesting.*"

Page 26 of this report shows that exports of food to North Africa have been decreasing, but *large amounts of seed for planting have been sent in order to expand food production and diminish the necessity for further food shipments.*

On page 28 it shows that more than *400,000 pounds of Lend-Lease seed* have been shipped.

The fourteenth report again refers to foods, and says:

> "In addition to food, we have sent about 9000 tons of *seeds for the production in Russia of more food in devastated areas now reconquered and in newly developed farmlands far in the interior.*" (p. 33)

On page 30, after specifying shipments sent to the Pacific and Far East, the report says:

> "Almost all the remaining shipments have consisted of *industrial materials and products for the production of fighting equipment, food, and strategic raw materials in Australia, New Zealand and India.*"

The seventeenth report refers to quantities of *industrial goods, foodstuffs, industrial materials and equipment, and other non-military lend-lease goods supplied by the Foreign Economic Administration.*

Special attention is called to the following language in the letter of transmittal submitting the eleventh report, on pages 5 and 6, as follows:

> "Except for the responsible fascist leaders, the people of the Axis need not fear unconditional surrender to the United Nations. I have said that we shall bring food for the starving and medicine for the sick in the areas liberated by the United Nations. We have done so, under lend-lease, in North Africa. We are doing so in Sicily. We shall continue to do so in other areas, as they are liberated, to prevent economic breakdown and to aid the liberated peoples to produce and to help themselves. We shall provide these necessary *civilian* supplies in support of our military operations and as a matter of simple humanity."

Thus, it will be seen that a large proportion of the goods transferred to foreign countries were bought and shipped under Lend-Lease, under the policy established by the President, and approved by Congress, for *civil* use. Congress has appropriated the following:

I. LEND-LEASE APPROPRIATIONS TO THE PRESIDENT.

First Lend-Lease Appropriation, March 27, 1941	$7,000,000,000
Second Lend-Lease Appropriation, October 28, 1941	$5,985,000,000
Third Lend-Lease Appropriation, March 5, 1942	$5,425,000,000
Fourth Lend-Lease Appropriation, June 14, 1943	$6,273,629,000
Fifth Lend-Lease Appropriation, June 30, 1944	$3,538,869,000
Total	$28,222,498,000

II. LEND-LEASE TRANSFERS AUTHORIZED FROM OTHER APPROPRIATIONS.

War Department:	
Third Supplemental, 1942	$2,000,000,000
Fourth Supplemental, 1942	4,000,000,000
Fifth Supplemental, 1942	11,250,000,000
Sixth Supplemental, 1942	2,220,000,000
Military Appropriation Act—1943	12,700,000,000
Navy Department:	
Second Supplemental, 1943	$3,000,000,000
Departments Other Than War:	
Third Supplemental, 1942	$800,000,000
Total	$35,970,000,000

(See Seventeenth Report, Appendix VII, page 60.)

From the above, it must be concluded that the intention of Congress was that shipments of defense articles as described in the Lend-Lease Act have no connection with, and do not come within, the exception of Section 3(a).

VII.

An administrative construction of a statute, which is immediately challenged, cannot be broadened into a settled administrative practice.

A Departmental construction of the Act does not, and cannot, have the force and effect of law. It appears from the decisions of the Comptroller General that several of the Government departments have construed the phrase "military or naval property of the United States moving for military or naval and not for civil use" to apply to all articles purchased under the Lend-Lease Act *regardless of the nature of the article*, or the use to which it is to be put; and throughout the rulings of the Comptroller General runs the idea that all that is necessary is that a notice be placed on the Bill of Lading, or for some officer or Department Agency to state that it was "moving for military or naval and not for civil use".

Although the Comptroller General takes the position that any goods purchased under the Lend-Lease Act, no matter what the character thereof may be, take land-grant rates, nevertheless, such Departmental ruling cannot be given the force and effect of law.

Iselin, Appt. v. *United States*, 270 U. S. 245, 251.

In referring to Administrative practices and Departmental rulings, the Court says:

> "The Government calls attention to the fact that, as early as October 24, 1919, the Commissioner of Internal Revenue made the ruling pursuant to which the tax here in question was assessed; that on March 22, 1920, the Attorney General sustained that ruling; that the provisions here in question were re-enacted without substantial change in the Revenue Act of 1921, Act of November 23, 1921, Section 800(a), chap. 136, 42 Stat. at L. 227, Comp. Stat. Sec. 6309-5/8A, Fed Stat. Anno. Supp. 1921, p. 190, and the Revenue Act of 1924, Act of June 2, 1924, Sec. 500(a), chap. 234, 43 Stat. at L. 253, Fed. Stat. Anno. Supp. 1924, p. 149; and that the administrative practice adopted in 1919 has been steadfastly pursued.

> It suggests that these facts imply legislative recognition and approval of the executive construction of the statute. But the construction was neither uniform, general, nor long continued; neither is the statute ambiguous. Such departmental construction cannot be given the force and effect of law."

The latest case on the subject is *Walling, Admr. of Wage & Hour Division, &c.* v. *Baltimore Steam Packet Co.*, Circuit Court of Appeals, Fourth Circuit, decided June 6, 1944, 144 Fed. (2d) 130. The opinion in the case is written by Circuit Judge Parker, and on *page 134 the Court* says:

> "The Collector relies upon what he says is the administrative construction placed upon the act; but administrative construction can be used as a guide to interpretation only when there is ambiguity in the language of the statute and the administrative construction is consistent and not plainly erroneous. There is no ambiguity in the statute here, and we fail to find evidence of any such settled and consistent administrative construction as would justify an interpretation at variance with what we think is clear meaning, if such interpretation were ever permissible. It is well settled that, in case of ambiguity, great weight is given to an administrative interpretation of a statute long and consistently followed; but it is equally well settled that where the provisions of an act are plain and unambiguous, the department administering it has no power to extend or amend it by regulations or interpretation (citing cases) . . . We are impressed here with the absence of any such consistent administrative interpretation as we would be justified in following, even if there were ambiguity.

See also:

Allen v. *Ocean S. S. Co. of Savannah*, 123 Fed. (2d) 469.

U. S. v. *Jackson*, 280 U. S. 183.

National Lead Co. v. *U. S.*, 252 U. S. 140.

It appears from a letter of the Lend-Lease Administrator, dated September 21, 1943, to the Deputy Food Admin-

istrator, War Food Administration, a copy of which was sent to the Comptroller General, that there was at that time no consistent administrative interpretation of the Lend-Lease Act by the various departments of the Government which the Comptroller General would be justified in following. In the letter, the Lend-Lease Administrator, in referring to the applicability of land-grant deductions to Lend-Lease shipments, (Exhibit No. 15 attached to the Stipulation of Facts), says:

> "The question is one with which the various agencies procuring and shipping lend-lease commodities and materials have had to deal. *We are informed that there has been a difference of opinion in some cases among representatives of such agencies.*"

This letter was written just twenty days prior to the letter of October 12, 1943, from the Comptroller General to the Auditor of Revenues of the Seaboard Air Line Railway, Ruling B-29861, and ninety days prior to the ruling by the Comptroller General in the instant case. So it definitely appears there was no consistent administrative ruling by the Government Departments even though the statute may be said to be ambiguous, and which the legislative history and the language of the Transportation Act itself show it is not. It also appears from what we have shown from the reports of the President, the Lend-Lease Administrator, and the Foreign Economic Administration, that the President had already laid down a policy which had been and was to be carried out in the future, to-wit: that the appropriations for Lend-Lease shipments were expended for the purchase of articles by and for *foreign governments* for *civil* as well as military *use*, and *not for the Government of the United States*, for military or naval use. The policy laid down, and interpretation of the Act, by the President, approved by Congress in granting additional appropriations, is in direct contradiction to the rulings of the Comptroller General.

In his letter to the Deputy Food Administrator the Lend-Lease Administrator further says:

> "The use made by the United States of all lend-lease materials is to promote the defense of the United States, which is clearly a military and not a civil use. It is this use which is determinative and controlling, rather than the use to which the goods may ultimately be put by the government to which they are transferred. There is, therefore, no need to inquire into such ultimate use. It is sufficient that the property is being shipped by the United States Government in the interests of its national defense and its military policy."

It appears from the various reports that goods are purchased and stored by the various departments of the Government and the ultimate use for which they are purchased is not known at the time of purchase, and probably not known at the time of transfer to the British Government.

Attention is called to the case of *Davies Warehouse Co.* v. *Bowles*, 321 U. S., 144. The opinion in this case was written by Mr. Justice Jackson.

In the Supreme Court, Price Administrator Bowles contended that the Supreme Court should accept the Administrator's views. The Supreme Court refused to do this. The Administrator's construction having been immediately challenged by the Warehouse Company, Mr. Justice Jackson said:

> "Lastly, it is contended that we should accept the Administrator's view in deference to administrative construction. The administrative ruling in this case was no sooner made than challenged. We cannot be certain how far it was determined by the considerations advanced, mistakenly as we think, in its defense in this case. It has already seasoned or broadened into a settled administrative practice. If Congress had deemed it necessary or even appropriate that the Administrator's order should in effect be final in construing the scope of the national price-fixing policy, it would not have been at a loss for words to say so. We do not

think it should over-weigh the considerations we have set forth as to the proper construction of the statute."

VIII.

In construing Section 321 of the Transportation Act of 1940 effect must be given to every clause, word or part of the act.

Our former Land Grant Acts have been quite general in language and scope. Heretofore, in designating the property to be subject to land grant rates, Congress has used such terms as "any property of the United States", "property of the United States"; etc., without further limitation. Under these statutes land grant rates have been given a wide application, and this has led to a more or less general impression that all Government property is entitled to land grant. The language of the new Act differs from the former Acts in that it describes specifically the Government property which *is to receive land grant*. We cannot ignore the fact, nor the effect, of the new language embodied in the present Act.

The exception in the new Act reads:

> "Military or naval property of the United States moving for military or naval and not for civil use."

The use of the term "military or naval property" is clearly restrictive. It indicates that it is not *all property* of the Government moving for military or naval use which is to be excepted, but only *military* or *naval* property. If Congress had intended that *all Government property* moving for military or naval use was to be excepted there would be no need for the adjectives "military" or "naval". They were manifestly not used to indicate ownership by the Government, for the clause "of the United States", takes care of that point. Nor were they used to indicate the use which is to be made of the property, for the language "moving for military or naval and not for civil use" takes care of that point. These words, therefore, must be regarded as de-

scriptive adjectives used to *modify* and *restrict* the property entitled to land grant rate, to *property which in and* of itself, possesses distinctly *military* or *naval* characteristics when *transported*, which is property of the United States and which is to be used for *military* or *naval* and *not* for civil use.

Any other construction of the Act would render meaningless the term "military or naval property", and would reduce to a status of mere surplusage the words "military" or "naval".

In *United States* v. *Standard Brewery*, 251 U. S. 210, 64 L. ed. 229, the Supreme Court said:

> "It is elementary that all of the words used in a legislative act are to be given force and meaning."

In *P. & N. R. Co.* v. *I. C. C.*, 286 U. S. 299, 76 L. ed. 1115, the Supreme Court said:

> "The Transportation Act was remedial legislation and should, therefore, be given a liberal interpretation; *but for the same reason, exemptions from its sweep should be narrowed and limited to effect the remedy intended.*"

So, the term "military or naval property" must be construed strictly. The Act provides that the full applicable commercial rates shall be paid for the transportation of *property* of the United States or on its behalf. The provision with respect to *military* or *naval* property is an exception to this general provision. Where an exception or proviso follows a general enacting clause, such as is the case here, such exception or proviso is to be strictly construed.

Platt v. *Union Pacific R. R. Co.*, 99 U. S. 48, construing the statute granting lands to the Union Pacific in aid of construction, is especially apt in requiring that full force and effect be given to the adjectives "military" or "naval", descriptive of the *property excepted*, and the words "military or naval and not for civil", descriptive of the *use*.

There is no question but that military impedimenta, arms and ammunition, instruments or implements of warfare, and the like, owned by the United States would be included.

Phosphate rock is essentially civilian material. Certainly if there is any Government property moving for military or naval purposes on which the land-grant rates are *not* to apply—and the statute clearly implies that there is—then it would be these materials, none of which possess any military characteristics in themselves or when transported.

We must not be misled by the fact that the property may be owned by the Government, or may be moving for purposes of the Government. If the property does not come within the description, these facts are immaterial. In *United States* v. *Union P. R. Co.*, 249 U. S. 354, the Supreme Court construing the term "troops" in a land grant act, held that neither a furloughed soldier nor an applicant for enlistment who had been accepted, came within the description, and said:

> "the fact that the transportation is for the purposes of the Government in connection with its military enlistment is immaterial."

The property must not only be the property of the United States but must be *transported* for *use* of the *United States*. The concluding words of the exception "military and naval property of the United States moving for military and naval and not civil use" are as follows:

> "Or to the transportation of members of the military or naval forces of the United States . . . when such members are traveling on *official duty*."

So that "members of the military and naval forces of the United States" do not come within the exception unless they are traveling on *official duty*, and obviously, official duty means performance of their duty as members of the military or naval forces of the United States.

So, if the property is not being transported for *use* of the *United States*, but is *transported* to be delivered to a *for-*

eign government for *its use*, the shipment does not come within the exception of Section 321 (a).

Most of the acts of Congress which granted land in aid of railroads provide that they shall be "free from toll or other charge upon the transportation of any property or troops of the United States." This clause was construed in *Lake Superior & Mississippi R. R. Co.* v. *United States*, 93 U. S. 442, as conferring only the free use of the railroad roadbed as a highway. Following that decision, under appropriate legislation, payment has come to be made by the Government for the transportation of property and troops at rates equal to 50 per cent. of rates named in duly published tariffs and charged to the public generally. *United States* v. *Union Pacific R. R. Co.*, 249 U. S. 354; *Louisville & Nashville R. R. Co.* v. *United States* 258 U. S. 374.

In Transportation Act of 1940 (54 Stat. 954), under the caption, "Rates on Government Traffic—Government to Pay Full Rates," the Congress, by section 321 thereof, modified the requirements theretofore effective in respect of so-called land grant traffic and required, with certain exceptions, that the United States should pay full applicable commercial rates, fares, or charges for transportation by any common carrier subject to the act of any persons or property of the United States, or on its behalf. The section provided an exception that the provision just mentioned "shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty." Section 321 (b) further provides in substance that if a carrier by railroad furnishing the transportation, or any predecessor in interest, shall have received grants of land from the United States, the provisions of law with respect to compensation for such transportation shall continue to apply as though Section 321 (a) had not been enacted until the carrier shall file with the Secretary of the

Interior a release of any claim against the United States to lands, interest in lands, etc. And a period of one year from the date of the Act (September 18, 1940) was allowed for filing of the release. It is understood that all the land grant lines have filed appropriate releases and are in a position to collect "commercial rates" to the extent authorized by Section 321 of that Act.

It is apparent from the foregoing resume of the provisions of Section 321 that there are two circumstances which are outstanding and controlling, (1) that by congressional legislation full commercial rates normally apply to transportation of government traffic, and that for lower rates to be applied the traffic must be shown to come within the exceptions specified in the section, and (2) that the Government has entered into a new and modified contract and agreement with the land grant lines which complied with and qualified under section 321 (b).

It is well settled that the contract between the United States and a railroad growing out of land grant legislation is binding on the United States, and the Government cannot, without consent of the railroad change it sterms by any subsequent legislation. *United States* v. *Central Pacific R. R. Co.*, 118 U. S. 235; *Perry* v. *United States*, 294 U. S. 330, 352.

It is clear, therefore, that the United States cannot legally increase or enlarge the burdens of the railroads in respect of land grant traffic over and above what existed as the result of early congressional legislation as modified by Section 321 of the Transportation Act of 1940. It is, of course, a corollary of this principle that the act of March 11, 1941 (55 Stat. 31, U. S. Code, Anno., Title 22, Sec. 411, 422), referred to therein as "An Act to Promote the Defense of the United States," and commonly known as the Lend-Lease Act, must be construed and applied accordingly.

IX.

Meaning of the phrase "Military or Naval Property of the United States Moving for Military or Naval and not for Civil Use."

We have found no definition of either "military property" or "naval property." Bouvier's Law Dictionary and 40 C. J. 658 define "military" as follows:

> "Anything pertaining to war or to the army; pertaining to war or to the army; concerned with war."

The definition of "naval" in Webster's New International Dictionary is:

> "Of or pertaining to ships or shipping; of, pertaining to, connected with, possessing, or characteristic of, vessels of war or a navy; as naval forces; naval victories; of first class naval power; naval stores."

The purpose of the exception in the Act being to limit the transportation of Government property, and there being no discussion in the Congress nor in the report of the Conference Committee where this exception to the bill was written, we will have to look elsewhere for the construction of this phrase. The Attorneys General of the United States have, from time to time, rendered opinions and construed the words "contraband of war" and "munitions of war" and Congress must have had this in mind in the passage of the Act, for Congress is presumed to have known and been familiar with the opinions of the Attorneys General when the Act was passed, and we will, therefore, refer to the various statutes and proclamations prohibiting the exportation of arms and ammunition leading up to the Neutrality Act of 1939.

On March 14, 1912, by Joint Resolution of Congress and proclamation issued thereunder by the President, it was made unlawful to export, except under such regulations and exceptions as the President shall prescribe,

"—any arms or munitions of war from any place in the United States to any American country in which conditions of domestic voilence are found by the President to exist."

The question was presented to Attorney General George W. Wickersham of what the term "arms and munitions of war" consisted. The Attorney General rendered an opinion on March 25, 1912 (29 O.A.G. 375) in which he listed articles which were treated by the International Conference held at London in 1908-9 as "absolute contraband" and said this list includes substantially all articles which may be considered as absolutely within the defintion of "arms and munitions of war." He further stated that—

"* * * Food and clothing may become contraband of war when destined to a port of naval equipment or an enemy, or for the supply of his army * * *, but they are classed as *conditionally contraband*, and not as absolutely contraband and do not fall within the usual definition of arms and munitions of war."

He then gave it as his opinion that without embracing all the articles referred to in the London Conference, the following should be considered within the term:

"Articles primarily and ordinarily used for military purposes in time of war, such as weapons of every species used for the destruction of life, and projectiles, cartridges, ammunition of all sorts, and other supplies used or useful in connection therewith, including parts used for the repair or manufacture of such arms, and raw material employed in the manufacture of such ammunition; also dynamite, nitroglycerin or other explosive substances; also gun mountings, limber boxes, limbers, military wagons, field forges, and their component parts, comprising equipment of a distinctly military character; articles of camp equipment and their distinctive component parts; and implements manufactured exclusively for the manufacture of implements of war or for the manufacture or repair of arms or war material."

He concluded, however, that "foodstuffs, ordinary clothing and ordinary articles of peaceful commerce are not included in the prohibition."

The question arose again in 1913 when the matter was presented to Attorney General J. C. McReynolds for an opinion whether articles of clothing "destined as the evidence indicates, for the use of insurgents" in Mexico were "munitions of war." The Attorney General in an opinion rendered August 11, 1913 (30 O.A.G. 213) ruled that "neither provisions nor ordinary, as distinguished from military, clothing falls within the category of 'munitions of war!'."

Later, the question was presented to Attorney General McReynolds whether "riding saddles, stirrups, girths, hay and other foodstuffs, and horses" intended for the Mexican army or for other parties are "munitions of war" within the meaning of the Joint Resolution and proclamation. The Attorney General, in an opinion dated October 6, 1913 (30 O. A. G. 227) refused to follow the opinion of Attorney General Wickersham as to the meaning of the term "arms and munitions of war" which was qualified in the statute by the phrase "in which conditions of domestic violence are found by the President to exist." In his opinion, Attorney General McReynolds stated:

> "I am satisfied the term 'munitions of war' should not be extended beyond the plain definition expressed in my opinion of August 11th. Outside of that limit you approach a debatable field where the articles are not clearly defined to 'promote domestic violence' where there is possibility of confusion in the minds of administrative officers; and, perhaps, the adoption of inquisitional methods, and where no line can logically be drawn short of practical non-intercourse with Mexico, a thing which I am sure Congress did not intend. And for these reasons, the particular designation of the articles, while important in determining their character as contraband, does not prove a safe guide to the character as 'munitions of war,' a character

which, in my judgment, must be fastened upon them by the inherent nature of the articles themselves."

"These conclusions caused me to dissent from the opinion of Attorney General Wickersham of April 20, 1912. . . This conclusion was probably largely based on the Declaration of London of 1909 (see 29 Op. 377-8) defining absolute contraband, and, as indicated above, I do not think such a declaration a correct guide to the meaning of the term 'munitions of war' in the Joint Resolution of Congress."

In addition to the Joint Resolution of Congress of March 14, 1912, above interpreted, there was an act passed on June 15, 1917, which provided that "whenever during the present war the President shall find that public safety so requires and shall make proclamation thereof, it shall be unlawful to export from or take out of the United States to any country named in such proclamation any *article or articles mentioned in such proclamation*, except under regulations."

Thereafter, the President issued a proclamation prohibiting the exportation of certain named articles to certain countries, including Mexico. The question arose as to whether this embargo on arms and ammunition to Mexico *extended to machinery to be used for the manufacture of arms and ammunition*. In an opinion rendered March 2, 1920 (32 O.A.G. 132) Attorney General A. Mitchell Palmer ruled, under the facts, that it did not, stating:

"It is to be noted that no state of war exists between Mexico and the United States, so that any articles exported from the United States and into Mexico constitute an illegal commerce as contraband of war, but such exportation and importation are only illegal by force of statutes and proclamations mentioned and to the extent therein stated. The nature of these provisions is such that they should be properly restricted to such articles as the ordinary significance of the terms used would cover. I do not think that machinery to be used in the construction of a plant for the production of arms and munitions of war in Mexico would constitute an exportation of such arms and munitions within fair

> construction of the language. Further, the carrying in of the machinery and the construction of a plant would hardly afford the same opportunities for promotion of disorder and conditions of domestic violence as would flow from the exportation of arms and munitions."

It will be noted that neither Attorneys General McReynolds nor Palmer took the same view of the character of arms and munitions of war as did Attorney General George W. Wickersham. Attorney General Wickersham based his opinion, 29 O.A.G. 375, March 25, 1912, apparently upon a list of articles prepared at the International Conference in London during the winter 1908-9, but even the reading of these articles, as shown above, excluded any such articles as the Comptroller General included in the use of land-grant rates.

In his opinion, August 11, 1913, Attorney General McReynolds said:

> "In my judgment, however, neither provisions nor ordinary, as distinguished from military, clothing falls within the category of 'munitions of war'."

and in his opinion of October 6, 1913, he says:

> "I am satisfied the term 'munitions of war' should not be extended beyond the plain definition expressed in my opinion of August 11. Outside of that limit you approach a debatable field where the articles are not clearly defined to 'promote domestic violence' where there is a possibility of confusion in the minds of administrative officers, etc."

Attorney General Palmer, in his opinion of March 2, 1920, regarding the exportation of arms and munitions to Mexico, held:

> "I do not think that machinery to be used in the construction of a plant for the production of arms and munitions of war in Mexico would constitute an exportation of such arms and munitions within fair con-

struction of the language. Further, the carrying in of the machinery and the construction of a plant would hardly afford the same opportunities for promotion of disorder and conditions of domestic violence as would flow from the exportation of arms and munitions."

The Attorneys General were dealing with military property in writing these opinions because the matters that they were passing upon were all related to the word "military."

When the present world war was threatened, the Congress on August 31, 1935, passed Senate Joint Resolution 173 (49 Stats. 1081), which provided:

> "Upon the outbreak or during the progress of war between, or among, two or more foreign states, the President shall proclaim such fact, and it shall thereafter be unlawful to export arms, ammunition, or implements of war from any place in the United States, or possessions of the United States, to any port of such belligerent states, or to any neutral ports of transshipment to, or for the use of, a belligerent country.
>
> "The President, by proclamation, shall definitely enumerate the arms, ammunition, or implements of war, the export of which is prohibited by this Act."

By proclamation No. 2163, dated April 10, 1936 (49 Stats. 3303) the President enumerated the articles which should be considered "arms, ammunition and implements of war" within the meaning of the Act, all of which items clearly come within that category.

On May 1, 1937, Congress passed Senate Joint Resolution 51 (50 Stats. 121), to amend the Act of August 31, 1935, which provided that "the arms, ammunition and implements of war so enumerated shall include those enumerated in the President's proclamation No. 2163, of April 10, 1936, *but shall not include raw materials or any other articles or materials not of the same general character as those enumerated in the said proclamation*, and in the Convention for the Supervision of the International Trade in Arms and

Ammunition, and in Implements of War, signed at Geneva June 17, 1925."

On May 1, 1937, the President issued his proclamation No. 2237 (50 Stats. 1834) listing additional articles, most of which are definitely articles of war or chemicals used in connection therewith, *there being no agricultural or other articles for civilian use listed.*

On September 5, 1939, the President issued his proclamation No. 2348 (54 Stats. 2629) proclaiming the neutrality of the United States in the war between Germany and the United Kingdom, et al., and on the same day he issued proclamation No. 2349 (54 Stats. 2634) under the Joint Resolution of May 1, 1937, listing further articles, the exportation of which was prohibited, most of which are definitely articles of war or chemicals used in connection therewith, *there being no agricultural or other articles for civilian use listed.*

On November 4, 1939, (54 Stats. 4), Congress passed House Joint Resolution 306, which repealed Joint Resolution of August 31, 1935, as amended, but did not expressly repeal the Joint Resolution of May 1, 1937.

Section 1(a) of this Joint Resolution provides that:

> "* * * whenever the President, or the Congress by concurrent resolution, shall find that there exists a state of war between foreign states, and that it is necessary to promote the security or preserve the peace of the United States or to protect the lives of citizens of the United States, the President shall issue, a proclamation naming the states involved; and he shall, from time to time, by proclamations, name other states as and when they may become involved in the war."

Section 2(c) provides, in part:

> "Whenever the President shall have issued a proclamation under the authority of section 1(a) it shall thereafter *be unlawful to export or transport,* or attempt to export or transport, or cause to be exported or transported, from the United States, to any state named in such proclamation, *any articles or materials*

(except copyrighted articles or materials) until all right, title, and interest therein shall have been transferred to some foreign government, agency, institution, association, partnership, corporation, or national. Issuance of a bill of lading under which title to the articles or materials to be exported or transported passes to a foreign purchaser unconditionally upon the delivery of such articles or materials to a carrier, shall constitute a transfer of all right, title, and interest therein within the meaning of this subsection. * * * "

Assuming that the Joint Resolution of May 1, 1937, was still in force and effect, this law would appear to prohibit the exportation of "articles or materials" not prohibited by the Proclamation, unless title thereto was vested in the purchase at port of embarkation. It will thus be seen that under the earlier neutrality laws the prohibition against exportation was directed to "arms and munitions of war", whereas under the recent neutrality laws they were restricted to "articles or materials" prohibited by the Proclamation of the President.

X.

Land-grant rates are not applicable to shipments of phosphate rock.

The condensed Chemical Dictionary, Third Edition, defines phosphate rock as follows:

> "A natural rock consisting largely of calcium phosphate used chiefly as a raw material for manufacture of phosphatic fertilizers, super-phosphate, triple (or treble) super-phosphate and dicalcium phosphate. A small amount is ground and applied directly to the soil. Among the minor uses are the manufacture of phosphorus and phosphoric acid and of ferrophosphorus for use in the steel industries. For adjusting the phosphorus content of pig iron, phosphate rock is included in the blast-furnace charge."

The phosphate rock here involved was neither
(1) military or naval property of the United States nor
(2) moving for military or naval and not for civil use.

In order to come within the exception contained in Section 321, the following essential things must be present:

The shipment must be
1. Military or naval property.
2. The property must be that of the United States.
3. It must be moved or transported.
4. For military or naval use.
5. It must not be transported for civil use.
6. The use must be for the United States.

Section 321(a) and Section 321(b) of the Transportation Act 1940 are amendments to the Acts of Congress granting lands to various railroads, in that they contain a partial release of the railroads' obligation to transport *Government* property at reduced rates upon the condition of releasing claims for additional lands, etc., which, upon filing the required releases, as has been done, constitutes a contract based upon adequate consideration. The debates in Congress, reports of committees and testimony of the witnesses before the committees show that it was the intention of Congress to *limit* the transportation of *Government* property at reduced rates to "military and naval property of the *United States* moving for military or naval and not for civil use." The language of these sections must be so construed that all the words shall have meaning and effect and that no word shall be superfluous or meaningless.

Property is not the *bare article* itself, *property* is more than the mere thing which a person owns. It includes the right to acquire, use and dispose of it, and the privilege of use is only one attribute among many of the bundle of privileges that make property ownership. *Buchanan* v. *Warley*, 245 U. S. 60; *Henneford* v. *Silas Mason Company*, 300 U. S. 577, 582. The words are "military and naval property of the United States *moving* for military or naval and not for civil

use.'" Property is *transported* for a variety of uses. Take the building of a camp for instance, or the building of a ship. Before the camp or cantonment can be built there must be shipped sand, cement, lime, hair, nails, lumber, brick, glass, wire, roofing, copper, pipes for gutters and drainage, doors, windows, window sash, and various other articles. These are purchased, stored, transported, processed and distributed before such articles are *used* in the building of the camp. These articles are *transported* for *construction* of the camp, which is a facility to be used by the Government *after completion of* the construction. However, the *property transported* for this *facility* is not property transported for *military use*. It is transported to be used by the contractor for the *construction* of the plant.

It appears from the President's directive that this property was *transferred to the British Government*. It was certainly not military or naval property of the United States, nor was it being moved or transported for military or naval use (of the United States).

The words in the Act were intended to apply *only* to military and naval property of the *United States*. If property is bought to be *transferred* to and *is transferred to some other Government*, certainly it was not the intention of Congress, as shown from the debates and reports, that land grant-rates should apply. Throughout the debates it was solely *property* of the *United States* upon which the debates turned. It was solely property of the United States, the *transportation* of which under land-grant rates was intended to be *restricted*, and it was likewise only such property that was moving for military and naval and not civil use. The camps and cantonments that we have just referred to were built by contractors under contract with the United States at cost plus. The articles going into the construction of these camps were articles moving to the contractors for *commercial* purposes only, which was *civil use*. The fact that the plant upon *completion* was to be *used* by the army, does not affect the other fact that the *property*

was the *contractor's property* for *use* in constructing the camp.

The Defense Act, known as the Lend-Lease Act, nowhere mentions the terms "military" or "naval."

This phosphate rock was not military or naval property of the *United States* moving for military or naval and not civil use. In the first place, it cannot, by any stretch of the imagination, be classed as military or naval property, which is excepted in the Transportation Act, whereas agricultural products are *defense* articles under the Lend-Lease Act. The use to which phosphate rock is put is for an agricultural purpose. In *McLeod* v. *Dilworth*, 322 U. S., 327, the Court distinguished between the words "use" and "sales" in the tax acts. The Court says: (pp. 330, 331)

> "A sales tax and a use tax in many instances may bring about the same results. But they are different in conception, *are assessments upon different transactions*, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. A *sales tax is a tax on the freedom of purchase—a freedom which wartime restrictions serve to emphasize. A use tax is a tax on the enjoyment of that which was purchased. In view of the differences between these transactions and the differences in the relation of the taxing state to them, a tax on an interstate sale like the one before us and unlike the tax on the enjoyment of the goods sold, involves an assumption of power by a State which the Commerce Clause was meant to end.*
>
> *. . . Though sales and use taxes may secure the same revenues and serve complementary purposes, they are, as we have indicated, taxes on different transactions and for different opportunities afforded by a State.*"

Land Grants were given in exchange for land granted by the United States, under statutes creating a contract for a valuable considration, and restricted to transportation of Government property. There was no intention that foreign governments were to be the beneficiaries.

Cross v. *United States, et al,* (CCA 7th) 133 Fed. (2d) 183 (1943).

In this case the Court said:

> "The situation thus disclosed brings us to the question as to whether a carrier shall be required to transport freight at land-grant rates *for the benefit of a party other than the Government.* * * * We are of the view, however, that there is no reason to construe such a provision so that the benefit will accrue to a third person."

XI.

Section 321(a) of the Transportation Act of 1940 must be read and construed in the light of the public policy entertained, and the purposes sought to be accomplished at the time it was enacted, rather than at a later period when different ideas and theories may prevail.

Prior to the enactment of Section 321 (a) of the Transportation Act, the United States was entitled to reduced rates on all of its shipments, *regardless* of the *character* of the *product* or its *use,* and, as shown by the hearings, the United States was the largest patron of the railroads. Congress recognized the fact that to apply 50 per cent of the rate fixed by the Interstate Commerce Commission as a reasonable rate would impose a great burden on the railroads, was an unjust discrimination against other shippers, and, for these reasons, Section 321 (a) was enacted. This statute, therefore, should be construed in the light of the public policy entertained by Congress *at the time of the passage of the Act,* and *not in the light of events thereafter arising out of the passage of the Lend-Lease Act.*

In *M. & O. Railroad* v. *Tennessee,* 153 U. S. 486, the Court stated the rule of construction of legislative contracts as follows:

> "Legislative contracts, especially, should be read in the light of the public policy entertained, and the pur-

poses sought to be accomplished *at the time they were made, rather, than at a later period when different ideas and theories may prevail.*"

Karnuth v. *United States*, 279 U. S. 231;
American Tobacco Co. v. *Werckmeister*, 207 U. S. 284.
Colgate-Palmolive-Peet Co. v. *United States*, 320 U. S. 422.
Maurer v. *Hamilton*, 309 U. S. 598, 608.
Sorrell v. *United States*, 287 U. S. 435, 446.

With these purposes in mind, it is well to examine the hearings, reports and debates in Congress to ascertain the purposes of Congress in enacting the exception, and it will be seen that the main purpose of Congress was to eliminate the abuse by the Government in applying land-grant rates to shipments of Government property; non-military in character, which the Government was applying to material going into construction for civil works throughout the country, especially after 1933.

From the history which we have heretofore set forth in full, it is apparent that the purpose of the Congress in enacting Section 321(a) was to limit, clearly and succinctly, the character of property belonging to the United States which was to be transported at land-grant rates, so as to exclude all property, except military and naval property of the United States moving for military or naval and not for civil use. That was the purpose of Congress *at the time the Act was passed*. There is nothing in the debates on the Lend-Lease Act to show that this declared purpose of Congress was to be defeated by a definition of "defense articles."

The theory of the Lend-Lease Act is in no way consonant with, and has no relation to, the purpose for which Section 321(a) was passed. The clearly defined purpose of the Lend-Lease Act was to give aid to foreign governments whose defense the President of the United States deems necessary to the defense of the United States, and the

simple definition of "defense article" in the Lend-Lease Act cannot be construed to affect the view of Congress in enacting Section 321(a). The definition in the Lend-Lease Act of "defense articles," in no sense of the word, can change the definition of the words "military or naval property of the United States, moving for military or naval and not for civil use."

The rule to be applied in interpreting Section 321 is that laid down by the Supreme Court of the United States in *United States* v. *Galveston, Harrisburg & San Antonio Railway*, 279 U. S. 401, *supra*.

XII.

The mere fact that property transferred to Great Britain is defined "defense articles" in the Lend-Lease Act, does not bring it within the exception of Section 321(a).

In the letter from the Lend-Lease Administrator to the Deputy Food Administrator, War Food Administration, dated September 21, 1943, a copy of which was sent to the Comptroller General, (Exhibit 15) upon which he based his decision and ruling in this case, as shown by his letter of December 23, 1943, mentioned herein, the Lend-Lease Administrator says:

> "The declared purpose of the Lend-Lease Act is 'further to promote the defense of the United States.' It empowers the President when he deems it to be in the interest of our *national defense* to authorize the head of any department or agency of the government to procure any defense article 'for the government of any country whose defense the President deems vital to the defense of the United States' and to dispose of such defense articles to any such government.
>
> The term 'defense article' as used in the Lend-Lease Act is defined in such manner as to include not only articles 'any agricultural, industrial, or other commodity or article for defense.' Correspondingly, the various acts appropriating funds to carry out the provisions of the Lend-Lease Act include, among others,

funds for the purchase of such 'agricultural, industrial, and other commodities and articles.'

The use made by the United States of all lend-lease materials is to promote the defense of the United States, which is clearly a military and not a civil use. It is this use which is determinative and controlling, rather than the use to which the goods may ultimately be put by the government to which they are transferred. There is therefore no need to inquire into such ultimate use. It is sufficient that the property is being shipped by the United States Government in the interests of its national defense and its military policy."

Under all of the rules of statutory construction which the courts have announced, in order to bring any kind of property transported within the above exception to the statute, the property must *not only* be (1) property of the United States, and also (2) moving for military or naval and *not* for civil use, but it must also be (3) *military or naval property*. If one of these three elements could be more essential to the applicability of the exception than the others (which is not true), the requirement that the property be "military or naval property" could well be held to be the prime essential requirement, because it *characterizes the nature* of the excepted property itself, while the other requirements *further limit the excepted property* by the *use* to which it is put.

The mere reading of the list of the kinds of property which the Government at least impliedly contends is 'military or naval property" negatives the Government's contention without argument or authority. Its contention applies to property such as seed, phosphate rock, superphosphate, machinery for any purpose, and other raw materials; and this, in the face of the fact that the President in his third report to Congress, December 12, 1941 (Page 11), lists all of this as "non-military goods", which it most obviously is. The Government's whole argument in this case is based on the gratuitous assumption, that the fact that the Lend-Lease Act denominates agricultural products and

the other kind of property above mentioned as "defense articles", and that all or some of these might be considered as remotely or indirectly useful in the ultimate defense of the United States, *ipso facto* makes such property "military or naval property." This, we submit, is not true, and practically assumes what the Government is required to show, namely, that such property, in addition to the other restrictive requirements of the exception, is "military or naval property."

We think by clear analogy the decision of the Supreme Court in *Southern Pacific Company* v. *United States*, 285 U. S. 240, 76 L. Ed. 736 (1932) is applicable here. That case held that engineer officers of the army presently in the service of the War Department, when assigned to duty in connection with the improvement of important rivers and harbors and the work of the California Debris Commission (involving improvement in navigation on certain California Tidal Rivers) were not "troops of the United States" within the provisions of the Railroad Land Grant Act then in force, which provided for reduced rates "for transportation of troops and munitions of war and military supplies and property." The court pointed out in referring to the case of *United States* v. *Union P. R. Co.*, 249 U. S. 354, that the fact that certain persons were members of the army would not of itself make them "troops" of the United States, such as a furloughed soldier for example. Likewise, the mere fact that some of this Lend-Lease material such as raw material, agricultural products, etc., would be indirectly and remotely useful in the general defense of the United States, would come far from making it "military or naval property" of the United States. In this case the Supreme Court said that, while the purpose for which these army officers were traveling, i.e. river and harbor improvements, "has in one aspect a bearing upon the *military defense* of the United States" "obviously" the court added, "the principal purpose of this work is the promotion of commerce and transportation, by maintaining

and deepening channels and constructing dikes, jetties, and other works which effect the improvement of navigation generally."

Furthermore, the Court says in the opinion, that "Congress has recognized that such service by engineer officers in non-military", citing certain provisions in the Army Appropriation Act; likewise, the President of the United States, who is charged with transferring the Lend-Lease materials to other nations has, as above mentioned, expressly listed these materials under the heading of "Non-military goods".

CONCLUSION.

We think we have demonstrated that the United States cannot maintain its counterclaim and, therefore, the judgment of the District Court should be affirmed.

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October 17, 1946.

APPENDIX.

Lend-Lease Act.

The Lend-Lease Act is as follows:

"Public Law 11—77 Congress—Chap. 11—1st Session
(H. R. 1776)

An Act Further to Promote the Defense of the United States, and for other purposes—(commonly known as the LEND-LEASE ACT).

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled*, That this Act may be cited as 'An Act to Promote the Defense of the United States'.

"Section 2. As used in this Act—

(a) The term 'defense article' means—

(1) Any weapon, munition, aircraft, vessel, or boat;

(2) Any machinery, facility, tool, material, or supply necessary for the manufacture, production, processing, repair, servicing, or operation of any article described in this sub-section;

(3) Any component material or part of or equipment for any article described in this sub-section;

(4) Any agricultural, industrial or other commodity or article of defense.

Such term 'defense article' includes any article described in this sub-section: Manufactured or procured pursuant to Section 3, or to which the United States or any foreign government has or hereafter acquires title, possession, or control.

(b) The term 'defense information' means any plan, specification, design, prototype, or information pertaining to any defense article.

"Section 3. (a) Notwithstanding the provisions of any other law, the President may, from time to time, when he deems it in the interest of national defense, authorize the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government—

(1) To manufacture in arsenals, factories, and shipyards under their jurisdiction, or otherwise procure, to the extent to which funds are made available therefor, or contracts are authorized from time to time by the Congress, or both, any defense article for the government of any country whose defense the President deems vital to the defense of the United States.

(2) To sell, transfer title to, exchange, lease, lend, or otherwise dispose of, to any such government any defense article, but no defense article not manufactured or procured under paragraph (1) shall in any way be disposed of under this paragraph, except after consultation with the Chief of Staff of the Army or the Chief of Naval Operations of the Navy, or both. The value of defense articles disposed of in any way under authority of this paragraph, and procured from funds heretofore appropriated, shall not exceed $1,300,000,000. The value of such defense articles shall be determined by the head of the department or agency concerned or such other department, agency or officer as shall be designated in the manner provided in the rules and regulations issued hereunder. Defense articles procured from funds hereafter appropriated to any department or agency of the Government, other than from funds authorized to be appropriated under this Act, shall not be disposed of in any way under authority of this paragraph except to the extent hereafter authorized by the Congress in the Acts appropriating such funds or otherwise.

(3) To test, inspect, prove, repair, outfit, recondition, or otherwise to place in good working order, to the extent to which funds are made available therefor, or contracts are authorized from time to time by the Congress, or both, any defense article for any such government, or to procure any or all such services by private contract.

(4) To communicate to any such government any defense information, pertaining to any defense article furnished to such government under paragraph (2) of this sub-section.

(5) To release for export any defense article disposed of in any way under this sub-section to any such government.

(b) The terms and conditions upon which any such foreign government receives any aid authorized under sub-section (a) shall be those which the President deems satisfactory, and the benefit to the United States may be payments or repayments in kind or property, or any other direct or indirect benefit which the President deems satisfactory.

(c) After June 30, 1943, or after the passage of a concurrent resolution by the two Houses before June 30, 1943, which declares that the powers conferred by or pursuant to sub-section (a) are no longer necessary to promote the defense of the United States, neither the President nor the head of any department or agency shall exercise any of the powers, conferred by or pursuant to sub-section (a); except that until July 1, 1946, any of such powers may be exercised to the extent necessary to carry out a contract or agreement with such a foreign government made before July 1, 1943, or before the passage of such concurrent resolution, whichever is the earlier.

(d) Nothing in this Act shall be construed to authorize or to permit the authorization of convoying vessels by naval vessels of the United States.

(e) Nothing in this Act shall be construed to authorize or to permit the authorization of the entry of any American vessel into a combat area in violation of section 3 of the Neutrality Act of 1939."

"Section 4. All contracts or agreements made for the disposition of any defense article or defense information pursuant to section 3 shall contain a clause by which the foreign government undertakes that it will not, without the consent of the President, transfer title to or possession of such defense article or defense information by gift, sale or otherwise, or permit its use by anyone not an officer, employee, or agent of such foreign government."

"Section 5. (a) The Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government involved shall, when any such defense article or defense information is exported, immediately inform the department or agency designated by the President to administer section 6 of the

Act of July 2, 1940 (54 Stat. 714), of the quantities, character, value, terms of disposition, and destination of the article and information so exported.

(b) The President from time to time, but not less frequently than once every ninety days, shall transmit to the Congress a report of operations under this Act except such information as he deems incompatible with the public interest to disclose. Reports provided for under this sub-section shall be transmitted to the Secretary of the Senate or the Clerk of the House of Representatives, as the case may be, if the Senate or the House of Representatives, as the case may be, is not in session.

"Section 6. (a) There is hereby authorized to be appropriated from time to time, out of any money in the Treasury not otherwise appropriated, such amounts as may be necessary to carry out the provisions and accomplish the purposes of this Act.

(b) All money and all property which is converted into money received under section 3 from any government shall, with the approval of the Director of the Budget, revert to the respective appropriation or appropriations out of which funds were expended with respect to the defense article or defense information for which such consideration is received, and shall be available for expenditure for the purpose for which such expended funds were appropriated by law, during the fiscal year in which such funds are received and the ensuing fiscal year; but in no event shall any funds so received be available for expenditure after June 30, 1946."

"Section 7. The Secretary of War, the Secretary of the Navy, and the head of the department or agency shall in all contracts or agreements for the disposition of any defense article or defense information fully protect the rights of all citizens of the United States who have patent rights in and to any such article or information which is hereby authorized to be disposed of and the payments collected for royalties on such patents shall be paid to the owners and holders of such patents."

"Section 8. The Secretaries of War and of the Navy are hereby authorized to purchase or otherwise acquire arms, ammunition, and implements of war produced within the jurisdiction of any country to which section 3 is applicable, whenever the President deems such purchase or acquisition to be necessary in the interests of the defense of the United States."

"Section 9. The President may, from time to time, promulgate such rules and regulations as may be necessary and proper to carry out any of the provisions of this Act; and he may exercise any power or authority conferred on him by this Act through such department, agency, or officer as he shall direct."

"Section 10. Nothing in this Act shall be construed to change existing law relating to the use of the land and naval forces of the United States, except insofar as such use relates to the manufacture, procurement, and repair of defense articles, the communication of information and other noncombatant purposes enumerated in this Act."

"Section 11. If any provision of this Act or the application of such provision to any circumstance shall be held invalid, the validity of the remainder of the Act and the applicability of such provision to other circumstances shall not be affected thereby."

"Approved March 11, 1941."